

ADR Training Manual: Introduction to Negotiation and Mediation



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Glossary of Key Terms

The glossary provides definitions of some of the terms used in this Training Module.

Adjudication	The act or process of adjudicating a dispute.
Ad hoc	For the particular end or case at hand without consideration of wider application.
Adversarial	Involving two people or two sides who oppose each other.
Alternative Dispute Resolution	or “ADR” is an umbrella term used to describe methods for resolving disputes outside the court system and can include mediation, conciliation, arbitration and facilitation.
Agreement	A contract duly executed and legally binding.
Arbitration	is a process where parties agree to resolve the dispute by bringing the matter before a neutral third party, an arbitrator, for decision.
Bargaining power	The relative capacity of each of the parties to a negotiation or dispute to compel or secure agreement on its terms.
Best practice	A procedure that has been shown by research and experience to produce optimal results and that is established or proposed as a standard suitable for widespread adoption.
Conciliation	is a confidential, voluntary and private dispute resolution process in which a neutral person helps the parties to reach a negotiated settlement.
Consensual	Existing or made by mutual consent without an act of writing.
Counter offer	A return offer made by one who has rejected an offer.
Decision Tree	A tree diagram that is used for making decisions in business and in which the branches represent choices with associated risks, costs, results, or probabilities.
Dispute	To engage in an argument or disagreement between two or more parties.
Enforcement	The action of compelling a party to comply with a law, rule, order, decision or judgement.
Judicial	Relating to a judgment, the function of judging, the administration of justice, or the judiciary.
Litigation	The act, process, or practice of settling a dispute in a court of law.
Mediation	is a voluntary, party-centred and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute.
Negotiation	Dialogue between two or more parties intended to reach an understanding or resolve a point of difference.
Offer	To present for acceptance or rejection
Renegotiation	To negotiate again
Revocation	An act or instance of revoking
Settlement	An act or process whereby disputing parties arrive at a mutually acceptable compromise or agreement.

I. Introduction

The ADR Training Manual: Introduction to Negotiation and Mediation constitutes an integral component of GIZ's Regional Project "Promoting the Rule of Law and Judiciary in Africa (PRoLA)," facilitating knowledge exchange and capacity building across all four partner countries involved in this initiative.

This Training Manual is designed to enhance the professional skills of participants in the United Republic of Tanzania by supporting partner organizations, whether civil society or state entities, in delivering targeted legal services. These efforts aim to improve access to justice for service recipients.

Despite Tanzania's adoption of the Arbitration Act in 2020, contemporary legislation that establishes clear conditions and criteria for the development of alternative dispute resolution mechanisms, practical implementation of the ADR system remains in its initial stages. Consequently, the GIZ Project seeks to advance this system, including through the provision of training for legal professionals.

The manual aims to propose pragmatic solutions based on legal principles and international best practices, striving to streamline the operations of ADR institutions in Tanzania and contribute to reducing caseloads within the judiciary.

Key topics of this Manual will include the organizational structure of ADR in Tanzania, procedures for initiating negotiation and mediation, prevalent challenges encountered, and the most common types of cases presented to relevant ADR institutions. Participants will engage in discussions and case studies drawn from international experiences, by employing a proactive approach to resolving typical cases handled by ADR institutions in Tanzania.

II. Objectives

The objectives of the Training Manual are ambitious, focusing primarily on promoting ADR services to facilitate alternative dispute solutions and deliver professional legal services. This initiative aims to equip participants with skills in basic knowledge on ADR case resolution, with focus on negotiation and mediation.

The Training Manual seeks to empower participants with basic knowledge that enhances their professional capabilities. This goal is based on the collective commitment of trainers and participants.

Upon completion of the training, participants will be able to better understand the organization of Tanzania's ADR system, the procedural stages of negotiation and mediation, key aspects of effective negotiation and mediation, and the implementation of negotiated and mediated settlement agreements. Moreover, participants will gain the competence to proficiently handle complex cases by drafting well-reasoned legal submissions.

III. Methodology

The training sessions will employ an interactive learning methodology comprising of lectures, exercises, and discussions. Following each presentation by the instructor, participants will engage in various exercises and subsequent conversations with peers and the instructor.

The methodology for the module's training sessions will include the following components:

- i) Use of visual aid including PowerPoint presentations utilizing various training techniques, graphics, images, and videos.

- ii) Interactive discussions involving questions and answers with participants.
- iii) Group work with pre-assigned tasks, preliminary discussions, mini-lectures, and role playing while considering the different levels of participants.
- iv) Preparation and discussion of practical case studies with participants including script of real mediation or negotiation scenarios to illustrate different mediation approaches and their application; and
- v) Blending physical and virtual participation

IV. Training Beneficiaries

The primary beneficiaries of this Training Manual will be any individual with interest in ADR from selected private sector organizations, private arbitration institutions, and public ADR officers. In each training session, there will be at least 25 women participants with confirmed prior experience in commercial law themes and entrepreneurship, as well as dispute resolution activities within the private sector.

V. Participant Objectives and Outcomes

This training manual is designed to foster the professional development of participants. It aims to equip them with the robust knowledge and skills essential for their daily tasks, particularly in addressing issues through alternative dispute resolution methods.

Furthermore, the interactive format of this training will shape participant expectations. Active participation will be required in listening, analyzing, and role-playing exercises, ensuring a practical approach to their work as legal professionals.

VI. First Module

1. Introduction to ADR and forms of ADR

The key to success in a competitive global economy is the ability to resolve conflict effectively. In many jurisdictions, as is in Tanzania, a court system is seen as a superior way of settling civil disputes, especially where that system is seen as independent and has rules for procedure, evidence and legal precedents that have been refined over a long period to ensure fairness. Litigation, a formal legal process involving the presentation of a case before a court, has deep roots in legal traditions worldwide. Originating as a means to ensure justice and uphold the rule of law.

The traditional method of dispute resolution or litigation has proved not to be adequate to deliver justice as per the requirements. The expeditious delivery of justice together with accessibility and affordability are the three elements of an effective judicial system. The old saying *justice delayed is justice denied* is becoming a norm, rather than remaining an exception. Delay defeats the parties of all hopes, and they feel insecure in the process of seeking justice.

An effective dispute resolution mechanism is less expensive, and speedy, and leads to a final resolution of the dispute. At the same time, it should be procedurally fair, efficient (in the sense of leading to optimal solutions), and satisfying to the parties. What is alternative, depends on what is traditional, and in Tanzania, this would mean the court structure and rules of civil procedure.

The pre-eminence of the court system is such that other forms of dispute resolution are commonly referred to as Alternative Dispute Resolution (or ADR), a means of resolving disputes outside of traditional frameworks.

The origins of ADR are traced to traditional societies. So, the system of ADR is not particularly new or innovative. However, interest in and creative applications of these alternatives exploded in the last quarter century. Therefore, ADR became popular in the 1990s onward.

In Tanzania, the most popular modes of ADR are mediation, adjudication, and arbitration. The ADR movement was launched pre-independence whereby the arbitration law was based on the 2 statutes, the Civil Procedure Code (CPC) and the Arbitration Ordinance enacted in 1932, supplemented by the Arbitration Rules of 1957 (GN 427 of 1957). In 1994, the First Schedule to the CPC was amended to introduce court-annexed mediation. In the same year, the Second Schedule to the CPC recognized court-supported arbitration.

In 2000, the Constitution of the United Republic of Tanzania (1977) was amended to promote and enhance dispute resolution among persons involved in the disputes and to dispense justice without being tied up with technicalities provisions that may obstruct the dispensation of justice under Article 107 (2) (d) and (e) which provides the authority of dispensation of justice.

Notably, Arbitration is one of the major forms of ADR. This is more formal than mediation and conciliation. There have been many moves to embed acknowledgment of the potential benefits of ADR within the civil litigation system. In 1994 ADR was formally acknowledged by the Civil Procedure Code ("CPC") providing for reference of cases pending in the Courts to ADR as being potentially relevant to all civil actions, to the extent that it is positively encouraged both at a pre-action stage and during the pendency of litigation. The Civil Procedure Code Cap 33 of 1966 - introduced Section 64 which provided for reference of matters to arbitration by either an order in a suit or otherwise, which were to be governed by Schedule 2 of the CPC providing for arbitration.

In 2019, the CPC was amended to cement the multi-door courthouse system and formalized other categories of ADR such as negotiation, arbitration, mediation and conciliation.

The High Court Mediation Centre (Dar es Salaam) represents a major and innovative shift from the traditional, litigation-centred approach to resolving disputes and to move towards a regime that recognizes the proper use of alternative methods to resolve disputes.

Some other ADR processes take place within a statutory or regulatory framework, and where this is the case, it is covered in the relevant part of this Manual.

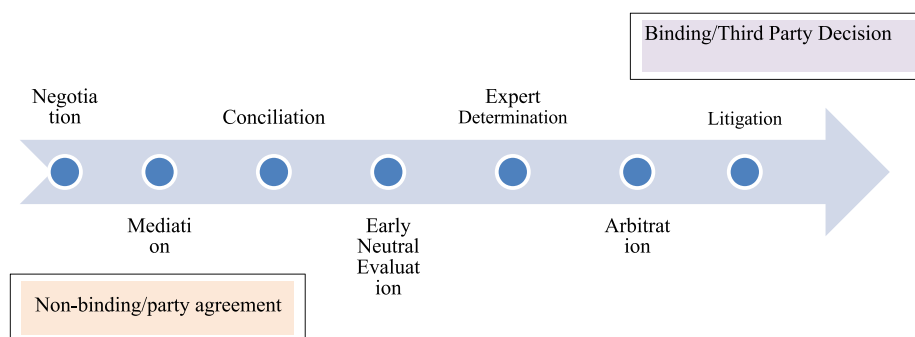
i. Definition of Alternative Dispute Resolution

The term "alternative dispute resolution" or "ADR" does not have an agreed universal definition. ADR can be described as *'an umbrella term for processes, other than judicial determination, in which an impartial person assists those in dispute to resolve the issues between them.'*

The literature reviewed indicates that there is contention about the meaning and use of the ADR acronym. The use of a range of other synonyms for ADR including *'appropriate'*, *'additional'*, *'assisted'*, *'administrative'*, or *'amicable'* dispute resolution have been identified in an attempt to remedy the positioning of ADR as an alternative to litigation.

ADR typically describes a multitude of techniques or approaches to early intervention and dispute resolution. Many of these approaches include the use of a neutral individual such as a mediator who can assist disputing parties in resolving their disagreements. ADR increases the parties' opportunities to resolve disputes prior to or during the use of formal administrative procedures and litigation (which can be very costly and time-consuming).

The ADR spectrum as presented in diagram below, is a visual representation of dispute resolution processes from negotiation through litigation. It is important to appreciate that ADR does not provide a single "menu" of alternatives to litigation from which a lawyer and client select a single option when a dispute arises. It is also relevant to be aware that ADR processes are not used only by lawyers. At the beginning of the spectrum, the parties are in full control of the process. As we move from negotiation towards mediation, we find that the process involves a neutral third party who does who does not have power to impose a binding decision and at the point of arbitration, the neutral makes a binding and final decision for the parties. ADR systems may be generally categorized as negotiation, conciliation/mediation, or arbitration systems. The mechanisms are often arranged to correlate with the levels of formality, increasing cost, third party involvement, decreasing control of the parties over the process and, the outcome's impact on preservation of the relationship between the parties.



At the simplest level, and in the ADR context under discussion, there are two ways in which a third party to a dispute can resolve the dispute: they can impose/recommend an outcome, or they can assist the parties in agreeing an outcome between themselves. As shown in diagram above, agreement-based approaches include negotiation and mediation, while decision-based approaches include expert determination, arbitration and adjudication. Some approaches fall somewhere in between these two ends of the spectrum. Early neutral evaluation and conciliation, for example, involve an evaluative approach which seeks to help parties make their own minds up without imposing a formal decision.

It is important to distinguish between binding and non-binding forms of ADR. Negotiation, mediation, and conciliation programs are non-binding, and depend on the willingness of the parties to reach a voluntary agreement. Arbitration may be either binding or non-binding.

It is also important to distinguish between mandatory and voluntary/consensual processes. Some judicial systems require litigants to negotiate, conciliate, mediate, or arbitrate prior to court action. ADR processes may also be required as part of a prior contractual agreement between parties. In purely voluntary processes, submission of a dispute to an ADR process depends entirely on the will of the parties.

ADR processes are also not mutually exclusive and can be used very effectively together. ADR is also being referred as a global system as it is not restricted by territorial jurisdiction.

ADR can be particularly useful to businesses in the following ways:

- Clarify areas of disagreement including the rights and the responsibilities of the parties involved in the dispute;
- Often cheaper, quicker and less formal than litigation/judicial processes;

- A sense of ownership in determining the outcome of the dispute; and
- Help to maintain or improve ongoing business relationships.

Dispute resolution through ADR processes is compromised if one or both parties do not approach the ADR process with a genuine desire to resolve the dispute. In these cases the ADR process may only delay formal resolution by a decision maker and increase costs.

ii. **ADR vs Litigation**

It is generally agreed that modern ADR has developed as a response to a number of perceived deficiencies of the traditional court system.

Although the characteristics of negotiated settlement, conciliation, mediation and arbitration, all share a few common elements of distinction from the formal judicial structure. These elements permit them to address development objectives in a manner different from judicial systems.

The use of ADR may significantly be cheaper than going to Court, especially if the case is settled at a relatively early stage before costs build up, and if a relatively inexpensive method such as negotiation is utilized by the parties.

ADR is typically faster and more efficient than traditional litigation. In the fast-paced world of data protection, where swift resolution is essential to mitigate potential harm, ADR offers a streamlined process that can lead to quicker outcomes.

ADR processes are generally private and confidential, unlike court cases, which are typically public. This confidentiality can be crucial for parties wishing to avoid negative publicity or disclosing sensitive information or trade secrets.

Courts resolve disputes via a binding process by applying legal and equitable principles to findings of fact. Any Court system is governed by strict rules of pleading and of evidence.

ADR procedures are not afflicted with such rigorous rules of procedure. In the case of arbitration, however, the rules of the arbitration institution, which are fixed, are sometimes applied. Otherwise, the parties may meet and fix the procedures for themselves with the help of a mediator. It is the substantive justice and not procedural justice that gets prominence in ADR. The ADR thus facilitates access to justice effectively and conveniently.

Parties may want control over both the process and outcome of their dispute. In non-adjudicative ADR they have control over the outcome, as this requires an agreement to be reached. In adjudicative ADR, while the outcome is beyond the control of the parties, they can retain varying degrees of control over the process.

Court litigation is adversarial by nature. Judges impose their own decisions on the parties, so the process tends to be formal and requires strict rules of procedure and evidence. In this environment the parties' positions often become polarised, and this can lead to an increasingly expensive and protracted resolution process. ADR seeks to avoid this by enabling the parties can achieve their unique solution. This flexibility allows ADR to be tailored to the specific needs and circumstances of the disputing parties, making it a more adaptable and responsive approach to dispute resolution.

ADR methods, particularly mediation, focus on collaboration and finding mutually acceptable solutions. If an ongoing relationship exists, such as a family or commercial relationship, a non-adjudicative option is likely to produce the most successful outcome as terms can be

fully discussed and agreed. This emphasis on cooperation can help preserve relationships that might otherwise be strained through adversarial litigation.

The rules of evidence in civil cases have been relaxed in various ways, but litigation still involves detailed rules for disclosure, discovery, inspection and the admissibility of evidence. An ADR process will normally be much more flexible as regards information and evidence. Disclosure can be burdensome and expensive, and this can be avoided in ADR.

The Court decisions are binding on Parties but are appealable. Arbitral awards are final and binding on the parties but are only subject to challenge on specified grounds. A binding settlement agreement is reached only if parties arrive at a mutually acceptable agreement and a decree/order in terms of settlement is final and is not appealable.

In addition to reducing the burden on the Courts and giving speedy justice to people, ADR processes are relatively inexpensive too.

Abraham Lincoln rightly said, *“Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time”*.¹

2. ADR forms and Institutions in Tanzania

It is generally accepted in both theory and practice of ADR methods such as mediation or arbitration that there are two basic forms, ad hoc and institutional.

i. Ad-hoc ADR vs Institutional ADR

An Ad hoc ADR process is that which is not administered by any institution. The ADR process on an ad-hoc basis provides greater flexibility for the parties in that they have the liberty to select and even design the rules and procedures to be applied to the conduct of their case, without necessarily being bound by the rules or procedures of any ADR institution and even after the dispute has arisen. As no administration fees are chargeable by any arbitral institution, ad hoc arbitration may also be more cost-effective than institutional ADR, especially concerning small claims.

On the other hand, institutional ADR is one where the parties refer their dispute to an institution and agree to be bound by the rules of such institution. With most users relying on institutional rules rather than ad hoc or their own tailored procedures, the impact of ADR institutions on efficient dispute system design cannot be understated. ADR institutions synthesize and codify best practices in the industry through intellectual cross-fertilization with users and practitioners, which is largely driven by institutional competition among institutions and jurisdictions.

ii. Matrix of ADR Institutions in Tanzania

There are several different institutions that are commonly used in arbitrations seated in Mainland Tanzania. The main ADR institution in Tanzania is the Tanzania Institute of Arbitrators (TI Arb) established as a registered society in 1996 to administer arbitration, mediation and other ADR procedures. TI Arb has a set of Mediation Rules (2021), Adjudication Rules and Arbitration Rules (2022) largely based on the UNCITRAL Arbitration Rules with modifications to fit the context. The Institute maintains separate Panels of Mediators, Arbitrators and Adjudicators. TI Arb has reported administering a total of thirty-eight (38) domestic arbitration cases for the period 2016–2020.² In 2020, the SOAS Arbitration in Africa Survey Report noted

¹ See at: <https://www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm>.

² See the TI Arb's 2019 Annual Report at: www.tiarb.or.tz/webmak/wp-content/uploads/2020/08/TI Arb-2019-Annual-Report.pdf

that TI Arb was 6th recording 89 cases administered under its institutional Rules³.

The National Construction Council (NCC) is a government institution established by the National Construction Council Act (No. 20 of 1979, CAP 162 Revised Edition 2008). Under this law, the NCC's mission includes facilitation of efficient resolution of disputes in the construction industry. The NCC Arbitration Rules apply primarily to construction disputes and are based on the UNCITRAL Arbitration Rules as modified to fit the context and Adjudication Procedure Rules 2017. If the parties so decide, these rules may also be applied to non-construction disputes. The NCC has not released any data specifically covering the period 2016–2019. However, the NCC has published a report that reviews a total of sixty-one cases conducted under its Rules during the period between 2002 and 2019. The report does not specify whether these cases are domestic or international arbitrations and is accessible online.⁴

The Tanzania International Arbitration Centre (TIAC) was incorporated in 2020 as a company limited by guarantee by the Tanganyika Law Society (TLS) to provide arbitration and other alternative dispute resolution services, including international and domestic commercial arbitration, adjudication, mediation, and conciliation. TIAC is an independent and impartial institution and maintains a panel of arbitrators and panel of mediators. TIAC operates with an Advisory Board, a Board of Directors, and a Secretariat, and draws on the established legal framework for international arbitration in Tanzania. TIAC is yet to commence operations.

The Tanzania Arbitration Centre (TAC) is a statutory body established under Part X, Section 82 of the 2020 Arbitration Act. It is a body corporate having perpetual succession, a common seal with power to acquire, hold, or dispose of property, and power to enter into a contract and to sue and be sued in its name. The functions of the TAC shall be to conduct and manage arbitration; register and maintain a list of accredited arbitrators; enforce the code of conduct and practice for arbitrators; manage and provide continuing education for arbitrators; and perform any other functions as the minister may direct.

There is a provision for professional associations to register with the TAC. This means that parties may only choose arbitrators registered by TAC. The governance structure of the body is subject to the Tanzania Arbitration Centre (Management and Operations) Regulations, 2021 (made under section 82(4) of the Tanzania Arbitration Act, 2020). Regulation 17 of the Tanzania Arbitration Centre (Management and Operations) Regulations (2021) provides that the Headquarters of the TAC shall be in Arusha. The Centre may establish branches in regions and cities in and outside Tanzania (s.82 (7)). The Arbitration (Rules of Procedure) Regulations (2021) apply to arbitrations conducted under the TAC. The Rules can be adopted by ad hoc tribunals and provide a schedule of fees. The Tanzania Arbitration Centre (Management and Operations) Regulations, as anticipated by section 95(2)(d), have laid out the management and operations of the Centre. The Panel of Arbitrators is currently being established and the Registrar of the Centre has yet to be appointed. The TAC currently has not registered any arbitrations.

As per the explanations above, we are presenting a table with ADR institutions in the United Republic of Tanzania.

Name of the Institution	Structure of the Institution	Headquarters
Tanzania Institute of Arbitrators (TI Arb)	Registered as a Society in December 1999	Dar es Salaam
Tanzania International Arbitration Centre (TIAC)	Company Limited by Guarantee incorporated in 2021	Dar es Salaam
National Construction Council (NCC)	Statutory institution established by Act No. 20 of 1979 (NCC Act, CAP 162 Revised Edition 2008)	Dodoma

3 SOAS Arbitration in Africa Survey Report; accessible here: <https://eprints.soas.ac.uk/33162/1/2020%20Arbitration%20in%20Africa%20Survey%20Report%2030.06.2020.pdf>.

4 See at <https://www.ncc.go.tz/uploads/publications/sw1571210186-ACCEPED%20REPORT%20-Arbitration.pdf>.

Tanzania Arbitration Centre (TAC)	Statutory Institution Part X - Section 82 of the AA2020	Dar es Salaam
Architects & Quantity Surveyors Registration Board (AQRB)	Regulatory body	Dodoma

3. Legal and Regulatory Framework

As previously noted, Alternative Dispute Resolution (ADR) in Tanzania was established through Government Notice No. 422, which was subsequently supplemented by the First Schedule to the Civil Procedure Code Act of 1966. ADR is now recognized as an integral component of the Tanzanian legal system.

i. Constitution of the United Republic of Tanzania

The Tanzanian legal system is founded on the principles of English Common Law. The primary source of law in Tanzania is the Constitution of 1977, supplemented by statutes enacted by Parliament, as well as case law from the High Courts and the Courts of Appeal

The Constitution of the United Republic of Tanzania of 1977⁵ in Article 107A (2)(d) provides a broad legal basis for the Alternative Dispute Resolution. This article provides the following:

“(2) In delivering decisions in matters of civil and criminal matters in accordance with the laws, the court shall observe the following principles, that is to say – [...] (d) to promote and enhance dispute resolution among persons involved in the disputes.”

ii. Civil Procedure Code, Cap 33

The legal framework for court annexed negotiation, conciliation and mediation referred under Order VIII of the Civil Procedure Code. in Order VIIC Rule 24⁶ provides that:

“Subject to the provisions of any written law, the court **shall** refer **every** civil action for **negotiation, conciliation, mediation** or arbitration or similar alternative procedure, **before proceeding for trial.**” (Emphasis supplied).

The procedural steps in negotiation and mediation are elaborated in Order VIIC Rules 25-34 of the CPC (Amendment to the First Schedule) Rules 2019⁷.

The purpose and nature of mediation is outlined under Order VIIC Rule 26 (1) of the CPC which reads:

*“In conducting any mediation session under these Rules-
(a) the parties shall strive to reduce costs and delays in dispute resolution, and facilitate an early and fair resolution of disputes; and
(b) the mediator shall facilitate communication between or among the parties to the dispute in order to assist them in reaching a mutually acceptable resolution.”*

The principle of confidential as provided under Order VIIC Rule 31 of the CPC shall be adhered to in court -annexed mediation:

⁵ See the Constitution of the United Republic of Tanzania of 1977; available at: https://www.nao.go.tz/uploads/Constitution_of_the_United_Republic_of_Tanzania_en.pdf..

⁶ Cap. 33 R.E. 2019

⁷ Order VIIC: Arbitration, Negotiations and Mediation Procedures: <https://tanzanialaws.com/statutes/principal-legislation/52-civil-procedure-code..>

“31. All communications at a mediation session and the mediation notes and records of the mediator shall be confidential and a party to a mediation may not rely on the record of statement made at or any information obtained during the mediation as evidence in court proceedings or any other subsequent settlement initiatives, except in relation to proceedings brought by either party to vitiate the settlement agreement on the grounds of fraud.”

Order VIII C Rule 36 of the CPC (Amendment to the First Schedule) Rules 2019 reads:

“36. -(1) At the request of any party and with consent of the other party, the court may refer any matter in dispute to negotiation or conciliation, and such matter shall be dealt with in accordance with the applicable law and the agreement of the parties to the negotiate or conciliate and arrive at a settlement.”

The Judicature and Application of Laws (Appointment, Remuneration and Disciplinary Of Mediators) Rules, 2024 apply to mediators conducting court annexed mediation.

4. Other ADR institutions

i. Commission for Mediation and Arbitration (CMA)

The Commission for Mediation and Arbitration (CMA) was established to address disputes arising from employment contracts through conciliation, mediation, and arbitration. This approach aims to provide lower-cost and more expedited resolution of labour disputes.

The foundational legislation governing the CMA includes the Labor Institutions Act of 2019⁸ and the Employment and Labor Relations Act (ELRA), 2019⁹. These statutes designate the CMA as an effective mechanism for resolving labor disputes through less formal and bureaucratic means.

Disputes that cannot be resolved through the CMA may be referred to the High Court (Labour Division), which has the mandate to adjudicate certain issues which the CMA has no jurisdiction over. Section 93 of the ELRA also provides for voluntary arbitration of labour related matters.

The CMA has also adopted the Employment and Labour Relations (Code of Conduct) 2007¹⁰ to govern the functions of mediators and arbitrators. During the establishment of the Commission for Mediation and Arbitration, specialized training was provided to prepare mediators and arbitrators for their roles, ensuring they are equipped to serve the entire country effectively.

The CMA has set up eleven operational offices, respectively in Dar es Salaam, Dodoma, Morogoro, Arusha, Tanga, Mwanza, Mbeya, Mtwara, Songea, Iringa, and Tabora. When a dispute is presented to the CMA, the parties involved must be represented by a third party, such as a trade union, the Association of Tanzania Employees, or a lawyer specializing in labor matters. The High Court Labour Division has consistently upheld the requirement that all labor disputes must first be referred to the Commission for Mediation and Arbitration for resolution.

⁸ Cap. 300 R.E. 2019.

⁹ Cap. 366 R.E. 2019...

¹⁰ G.N. No. 42 of 2007...

ii. Tax Ombudsman Office of Tanzania

The Tax Ombudsman Office of Tanzania (TOST) is an independent government entity established under Section 28A of the Tax Administration Act (Cap 438) in 2019. The office operates with full legal mandate in redressing maladministration pertaining to *procedural, service and administrative matters* committed by the Tanzania Revenue Authority (TRA) while administering tax laws. In determining the complaint, the Ombudsman may resolve the matter amicably through mediation, conciliation, or any other method which he may consider appropriate.¹¹

iii. Tanzania Insurance Ombudsman

Tanzania Insurance Ombudsman (TIO) is established under Section 122 of the Insurance Act (No. 10 of 2009) and charged with the responsibility of resolving disputes arising between insurance consumers and insurance registrants in business in Tanzania. The Regulation 6 (1) (c) of the Insurance Ombudsman Regulations (2013) provides for TIO “to conduct mediation, reconciliation and arbitration”.

VII. Second Module

Unit One:

i. Negotiation

A. Definition and Concept of Negotiation

Negotiation originated in the earliest civilizations as a form of alternative dispute resolution. Resolving conflicts has been integral to social and economic evolution, shaping interactions and agreements throughout history.

The term ‘negotiations’ is not defined in the legislation. There are different definitions of negotiation. Harvard University defines negotiation as “*a bargaining process through which parties attempt to forge an agreement to resolve disputes, establish a business contract, purchase a new home, or conclude a peace treaty*”¹².

The Pepperdine University (USA) has developed an explanatory definition of negotiation: *Negotiation is a communication process used to put deals together or resolve conflicts. It is a voluntary, non-binding process in which parties control the outcome as well as the procedures by which they will make an agreement. Because most parties place very few limitations on the negotiation process, it allows for a wide range of possible solutions maximizing the possibility of joint gains.*

From the perusal of the definition, the following essential elements can be extracted:

- It is a communication process;
- It resolves conflicts/disputes;
- It is a voluntary exercise;
- It is a non-binding process;
- Parties retain control over outcome and procedure; and
- There is possibility of achieving wider range of solutions and of maximizing joint gains.

Negotiation is the dominant element in the mediation process and almost of every other dispute resolution process.

¹¹ Section 28C(a) of the Tax Administration Act (Cap 438)....

¹² See at: <https://www.pon.harvard.edu/tag/negotiation> for further information.

Generally, as a concept, negotiation is present in every phase of human development, influencing both personal and professional relationships. At its core, negotiation involves discussions between individuals or legal entities aimed at reaching mutually satisfactory agreements. However, mastering the art of negotiation requires more than just basic understanding; it demands expertise, information, intuition, and effective strategies. These qualities, while not innate, can be developed through study and practice, supported by the literature and doctrine.

The author Brian Tracy highlights the importance of overcoming fear to negotiate effectively.¹³

B. Characteristics of Negotiations

Like other ADR methods, negotiation is characterized by its features which make it distinct from other forms of ADR. These features include informality, confidentiality, and flexibility while considering the interests of all parties involved.

Participation in a negotiation is entirely optional or voluntary for all parties involved. They are free to accept or reject the outcome and may withdraw from the process at any time. Parties can choose to participate directly or be represented by a family member, friend, lawyer, or other professional.

There is no third party to facilitate the resolution process or impose a sentence. It is an act of goodwill through back- and-forth communication designed to reach an agreement between two or more parties with some interests that are shared and others that may conflict or simply be different.

Generally, there are no fixed or prescribed rules governing negotiations. The parties have the freedom to establish their own guidelines, if any, including the subject matter, timing, and location of the negotiations. Issues such as confidentiality, the number of negotiation sessions, and the use of documents can also be determined by the parties.

The scope of a negotiation depends on the choice of the parties. The parties can determine not only the topic or the topics that will be the subject of the negotiations, but also whether they will adopt a positional-based bargaining approach or an interest-based approach.

Negotiations can be conducted either publicly or privately, depending on the parties' preferences.

Negotiation involves only the parties. The outcome of a negotiation is reached by the parties together without recourse to a third-party neutral.

The scope of a negotiation is determined by the parties involved. They can choose the topics to be discussed and decide whether to adopt a position-based or interest-based approach to the negotiations.

C. Advantages and Disadvantages of Negotiations

Generally, negotiation stands as one of the most adaptable forms of dispute resolution. It involves only the parties with interest in the matter and their representatives, if any. The parties are free to tailor the negotiations to their specific needs, including setting the agenda, choosing a public or private forum, and identifying the participants. By consulting all interested parties about their willingness to participate and implementing measures to prevent power imbalances, the likelihood of reaching an agreement acceptable to all parties is enhanced.¹⁴

¹³ Brian Tracy, "Negotiation", (Amacom, 2013), p. 11.

¹⁴ See at: <https://www.justice.gc.ca/eng/rp-pr/cs-j-sjc/dprs-sprd/res/drrg-mrrc/>.

While no dispute resolution method can guarantee a successful outcome for one side, many experts believe that negotiations are more likely to succeed when the parties adopt an interest-based approach rather than a position-based one. By focusing on mutual needs and interests and employing objective standards, there is a greater chance of reaching an agreement that satisfies all parties involved. This approach is often referred to as a “win-win” strategy.¹⁵

Negotiation is in principle voluntary; no party is compelled to participate if they do not wish to do so. There is no requirement to involve a neutral third party, which is particularly important when the matter at hand is sensitive, and the parties prefer to handle it internally.

D. What is negotiable in typical business situations?

Business negotiations encompass a wide range of issues, including sales and purchases, workers’ compensation, leases, mergers and acquisitions, contractual obligations, and similar matters pertinent to the parties involved.

However, the cornerstone of these negotiations lies in conducting them in good faith. Research indicates that negotiations conducted in good faith consistently yield better outcomes.

E. Identify approaches to negotiation and styles

Negotiation styles can vary based on the subject matter, but they are often categorized into positional or competitive and cooperative or interest based.

The positional or competitive style has faced criticism for its focus on the parties’ positions rather than their underlying interests.¹⁶ Furthermore, the criticism in this regard is that there is a tendency to promote extreme negotiation tactics, which undermine the mutual trust essential for achieving shared benefits.¹⁷

As the term suggests, cooperative or interest-based negotiation emphasizes the interests of both parties. This approach ensures that, after the negotiations, neither party benefits at the expense of the other.¹⁸

It is crucial to emphasize that common interests and values are implied in this objective approach. Ultimately, the goal of the negotiations is to achieve a balanced solution that is mutually agreed upon by both parties.¹⁹

ii. Principles of Negotiations

Effective negotiation must be organized and focused on its intended purposes. While negotiation is guided by many principles, the most important are voluntary participation, timelessness, effectiveness, good faith, and confidentiality.

Negotiation is a voluntary option for the parties involved. This means that both parties must agree to submit their dispute to the persons responsible for negotiating.

It is designed to shorten proceedings, not prolong them. Even if a negotiated settlement takes longer, the outcome may ultimately be more beneficial for all parties involved.

¹⁵ Ibid.

¹⁶ Roger Fisher, William Ury & Bruce Patton, “Getting to Yes,” 1992, p 3-11.

¹⁷ Ibid, p. 5-7.

¹⁸ John S. Murray, Understanding Competing Theories of Negotiation, 1986, p. 180-181

¹⁹ Ibid.

Although negotiation may not entail direct costs for the parties involved, it is not entirely free. The negotiation process can incur unforeseen expenses, potentially increasing the overall costs. Nevertheless, compared to other methods, negotiation remains more cost-effective.

Participants in negotiation should engage in the process with the genuine intent of reaching an agreement, rather than using it to delay or gain a tactical advantage.

As with other ADR processes, negotiation requires confidentiality to ensure that the parties can candidly explore their fundamental interests.

III. Stages and the Structure of Negotiations

Since negotiation heavily depends on the parties involved, no specific rule governs the development of its phases and strategies. However, the legal issues pertinent to the respective countries must be considered.

Effective negotiation necessitates thorough preparation and meticulous planning. When these elements are prioritized, the negotiation is more likely to conclude successfully.

For this module's purposes, the negotiation phases and strategies have been carefully considered.

The commercial negotiation process typically unfolds through several key stages: initial contact and agreement, emergence of disputes, preparation for negotiation, formulation of negotiation strategies, the negotiation phase, and negotiation closure.

The process of negotiation works only when:

- The parties are willing to co-operate and communicate to meet their goals.
- The parties can mutually benefit or avoid harm by influencing each other
- The parties know that they have time constraints
- The parties realize that any other procedure will not produce desired outcome
- The parties can identify the issues required to be sorted out
- The parties also agree that their interests are not incompatible to each other
- The parties knew that it is preferable to participate in private cooperative process, rather than go through severe external constraints like loss of reputation, excessive cost and possibility of adversarial (imposed) decisions.

iv. The Legal Basis of Negotiation

As outlined above, the legal framework for negotiation in the United Republic of Tanzania is established by its Constitution, the CPC and other statutory laws and regulations.

The Initial Contact and the Conclusion of the Contract

Before concluding a business relationship, it is customary to engage in a final round of negotiations to finalize the business or commercial contract, typically preceding the emergence of any potential disputes.

A. Contract conclusion

To form a contract, specific conditions (essential elements), must be satisfied, which vary depending on the country's legal system. The Law of Contract²⁰ provides for the principles and elements which include, but are not limited to:

- The legal capacity and ability to act of the parties involved.
- The clear expression of intent by the parties.
- An appropriate and lawful object of the contract.
- Compliance with the required legal form.

In common law legal systems, however, three fundamental elements must be met to form a valid contract: agreement, the intention to create legal relations, and consideration.²¹

The first essential element of a contract is the agreement between the parties. This agreement is established when one party makes an offer, and the other party accepts it. Typically, courts determine the existence of this agreement by applying the objective test.²²

The second essential element of a contract is the intention of the parties to enter into a binding relationship. Establishing this intention can be challenging. It is more accurate to state that the explicit absence of the claimed agreement significantly impacts the determination of the contract's intention. Consequently, the more ambiguous or vague the agreement, the higher the likelihood that the court will conclude that the parties have not reached a mutual agreement.²³

Finally, the element known as consideration must be addressed. Consideration refers to the goods or values exchanged between parties. Essentially, it is the promise one party makes to the other in return for a benefit.

B. Offer and Acceptance

A contract signifies the conclusion of negotiations, offers, and counteroffers, culminating in its signing. This implies that once negotiations have taken place, and an offer has been made and accepted, the essential elements of the contract are considered determined.

In practice, issues often arise concerning the contract's existence, frequently due to unproductive or unclear negotiations regarding the parties' objectives. Hence, the importance of conducting thorough and genuine negotiations cannot be overstated. Additionally, difficulties in finalizing a contract can stem from the lack of clarity in the offer or counteroffer made by the involved parties.

C. Standard terms of the contract

When are the standard terms of a contract considered to be part of the contract?

Standard terms and business practices are often intertwined, which can result in unclear contracts²⁴. Although the standard terms of contracts can sometimes hinder their conclusion, it is important to recognize that these conditions are a common feature of commercial contracts²⁵. They offer the advantage of reducing transaction costs, particularly in sectors where contracts are standardized. This benefit is especially significant in industries that rely heavily on sector-specific contracts.

²⁰ Cap. 345 R.E. 2019..

²¹ Norton Rose Fulbright, "Corporate and Commercial Disputes Review", 2018, p. 18.

²² Allen & Overy, "Basic Principles of English Contract Law", Advocates for International Development, p. 3.

²³ Norton Rose Fulbright, "Corporate and commercial disputes review", 2018, p. 18..

²⁴ Cambridge University, "When Standard Terms are the Terms of a Contract", 2009. See at: <https://www.cambridge.org/core/journals/cambridge-law-journal/article/abs/when-standard-terms-are-the-terms-of-a-contract/>.

²⁵ Mark R. Patterson, "Standardization of Standard-Form Contracts: Competition and Contract Implications" (*William and Mary Law Review*, Volume 52) 2010, p. 327.

D. Involvement of lawyers in contract negotiations

The role of lawyers is crucial in advising companies during contract negotiations. Their legal expertise safeguards the company's interests and helps prevent significant errors.

Legally vetted contracts provide a secure foundation for business interactions, fostering productivity and innovation.

At the core of any commercial enterprise are contracts—binding agreements that define the terms of business transactions. Despite their prevalence, the complexities and nuances of contracts often elude those without legal expertise. This is where the role of a legal professional becomes indispensable. Lawyers, with their specialized knowledge of the law and its applications, bring clarity and understanding, thereby mitigating the risks associated with contractual obligations²⁶.

i. The Dispute

Historically and in contemporary doctrine, various theories have emerged concerning conflicts in contract law. Some theorists emphasize the importance of enforcing contracts to protect the autonomy and freedom of the parties involved²⁷. Others highlight the instrumental benefits and advantages that contracts provide²⁸. Additionally, some theorists prioritize the prevention of future contract violations²⁹.

However, in the context of this module, it is essential to consider the conflict minimization theory as a key objective when concluding contracts. In this regard, the author MacMahon rightly asserts that the value of conflict minimization in modern contracts aligns with the fundamental purpose of substantive law.³⁰

In practice, disputes often arise between parties involved in contractual relationships. These disputes typically concern whether the contractual relationship (such as a specific contract) exists, its content, whether it has been terminated or fulfilled, or if there is a delay in its fulfilment, impacting the realization of rights. In such cases, the parties can seek resolution through the regular courts or ADR mechanisms by initiating procedures for the enforcement of their rights.

A. Types of Disputes

Legal and physical persons enter various legal relationships almost every day, resulting in the creation of specific rights and obligations. A right is a legal entitlement allowing a party to act in a certain way to protect their interests. Conversely, a legal obligation entails specific behaviour (either an action or inaction) required of the obliged party to achieve a particular purpose.

The holder of a right is entitled to demand the fulfilment of the obligation from the obliged party within the established legal relationship. Typically, the obliged party fulfils their obligation voluntarily and willingly, thereby realizing the right of the entitled party. In such instances, the legal relationship is carried out spontaneously and voluntarily, leading to the fulfilment of the legal-civil order in the practical interactions between legal entities.³¹

²⁶ See at: <https://www.lawyersuae.com/business-lawyer/>.

²⁷ See Charles Fried, *Contract as Promise: A Theory of Contractual Obligations*, (Harvard UP, 1981).

²⁸ See Liam Murphy, "The Practice of Promise and Contract", in Gregory Klass, George Letsas, and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (OUP, 2014).

²⁹ Arthur Linton Corbin, *Corbin on Contracts*, Vol 5 (2nd edn. West Publishing 1964), p. 23.

³⁰ MacMahon, "Conflict and Contract Law" 2018, p. 40..

³¹ Janevski, Zoroska – Kamilovska, "E drejta kontestimore", Skopje, 2009, p. 1.

However, not all individuals always adhere to their legal authorizations and obligations. In certain cases, they act contrary to legal norms, resulting in infringements, disputes, or violations of rights. Such situations necessitate the enforcement of their rights through coercive measures, aimed at protecting the rights established by legal norms or contracts.³²

Depending on the nature of contractual relationships, various disputes may arise. Broadly categorizing disputes in contract law, they primarily fall into these categories (non-exhaustive):

- Breach of contract
- Partnership disputes
- Business disagreements
- Non-compete covenant
- General Liability
- Banking and Financial/Project Finance
- Insurance and Reinsurance
- Real property/Lease
- Sale of Goods
- Construction
- IP-related issues
- Capital markets, securities and derivatives

B. Dispute vs. Conflict

Parties to the contract are often driven by their interests, which can frequently lead to conflicts with others. In everyday language, laypeople often struggle to distinguish between a dispute and a conflict.

According to John Burton, a dispute is a short-term disagreement that can be resolved through negotiation, as it involves negotiable issues. In contrast, conflict is long-term and involves deeply rooted issues that are perceived as non-negotiable.³³ Therefore, how do we make the difference between a dispute and a conflict in terms of everyday experiences?

When conflicts are inadequately managed or cannot be resolved, disputes arise. Disputes centre around issues or situations of interest. Unlike interests, which are negotiable, divisible, and finite, needs are usually non-negotiable. Due to their intrinsic nature, needs are neither transferable nor divisible.³⁴

C. Escalation of disputes

When disputes are not solved, they escalate. The escalation of a dispute, in commercial disputes, often refers to situations where parties, in the event of a disagreement, move the issue up the company's hierarchy, seeking resolution at higher management levels.

Some contracts include an 'escalation clause' that outlines the procedure for addressing specific content. These clauses specify the steps parties must follow before resorting to court or other dispute resolution methods³⁵.

In the context of this module, participants should consider that during contract negotiations, they have the opportunity to specify the level of dispute resolution. It is crucial to balance the need for a swift resolution and the greater involvement of the company's management structure.

³² Ibid, p. 2...

³³ John Burton, *Conflict: Resolution and Prevention* (New York, St. Martin's Press) 1990.

³⁴ Kariuki Muigua, "What is the Difference between Conflicts and Disputes", 2022. See at <https://thelawyer.africa/2022/04/22/difference-between-conflicts-and-disputes/>

³⁵ See at: <https://harperjames.co.uk/article/how-to-resolve-a-contract-dispute-step-by-step/>

D. Avoidance of disputes

Avoiding commercial disputes is often considered advantageous, as it allows company resources to be allocated to more important tasks. However, the question arises: how can disputes be avoided?

One effective method is to have contracts drafted by lawyers skilled at preventing disputes. This is best achieved during the negotiation and drafting phases of the contract, ensuring the terms are clearly defined to avoid misunderstandings.

Another method is the so-called de-escalation of the dispute, a critical stage for avoiding conflicts. At this stage, the parties recognize that they are at an impasse and, understanding the situation, take the time to better prepare their case, thereby avoiding the dispute.

Do you know any other ways to avoid disputes?

E. Renegotiation of clauses

Renegotiation of clauses or conditions in commercial contracts is rare but is more common in investment contracts.

In practice, this procedure allows the parties to decide, often through a forum such as an arbitration tribunal, on modifying the contract's clauses. Proponents of this approach argue that if the parties cannot reach an agreement, they can consent to an arbitration tribunal altering the contract terms to restore the economic balance intended when the contract was initially concluded.³⁶

Despite its potential benefits, this practice is infrequently utilized. The reasons for this include concerns that it may render the contractual relationship unpredictable and increase transaction costs. Gotanda shares this perspective, advocating that renegotiation clauses should be used sparingly. He argues that these clauses should not be employed when one of the parties controls the events prompting the renegotiation.³⁷

From a practical standpoint, the renegotiation of contract clauses highlights several key aspects. Firstly, it suggests that the contract drafters may not have given sufficient attention to detail during the negotiation phase. Secondly, it indicates that the parties' approaches may have shifted during the implementation of the contract, potentially leading to conflicting interests.

Under Tanzanian law, a contract can usually be renegotiated and modified or varied at a future date. A contract modification, therefore, refers to "a situation where the contracting parties agree to alter the earlier terms of their original agreement. Understandably, an alteration of a contract may happen for various reasons including those which may be outside of the parties' control. If such alterations take place, they may take place in whole or in part."³⁸

Section 62 of The Law of Contract Act (Cap. 345, R.E 2019) provides for contract modification, novation³⁹ or renegotiation and its consequences. It provides expressly that:

"Where the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

Under the law of contract, "once a written contract is concluded between two or more parties, it cannot be varied, changed or amended unless expressly agreed and/or consented by the parties thereto"⁴⁰ However, "if a contract will require major changes, the contract may need to be renegotiated or possibly replaced by a new contract."⁴¹

³⁶ Klaus Peter Berger, "Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators, 36 Vand. J. Transnat L. (2003), p. 1347.

³⁷ John Y. Gotanda, "Renegotiation and Adaptation Clauses in Investment Contracts, Revisited, 36 Vanderbilt Law Review (2021), p.1462.

³⁸ Per Nangela, J., in *SCI (Tanzania) Ltd. v. Gulam Huamedali Punjani & Pristine Properties Ltd.*, High Court of Tanzania (Commercial Division) at Dar es Salaam, Commercial Case No.130 of 2020 (Unreported).

³⁹ Ibid (defining the doctrine of novation as a situation where 'one original contract is extinguished and replaced by a new one.').

⁴⁰ Ibid.

⁴¹ Ibid.

ii. Developing Strategies Before Negotiations

Reputable parties engaged in dispute resolution through negotiation conduct a thorough search and develop a comprehensive strategy prior to entering negotiations. These preparatory actions include controlling the negotiation environment, establishing the agenda, and enhancing bargaining power from the outset, among other measures.

A. Control of the negotiation venue

Contractual parties typically prefer negotiations to occur in their location, which provides significant advantages.

The party hosting the negotiations usually wields greater influence over the agenda and outcomes of the meetings.

However, while this factor is influential, parties negotiating in their familiar surroundings also have enhanced opportunities to assert their preferred solutions at the negotiation table. Moreover, the party that “sets the agenda” enjoys a more favourable position to steer the discussions and dynamics of the negotiation process.

B. Schedule and agenda

Controlling the location, as mentioned above, significantly influences the scheduling and agenda-setting of negotiations.

Establishing a structured process and meticulously preparing an agenda are crucial steps in the negotiation process. Each agenda item should be clearly defined with specific time allocations, which helps focus discussions solely on agenda items and accelerates decision-making.

Additionally, openness to feedback and attentive listening to all participants are essential. Actively listening and seeking clarification on unclear points are equally important. Ultimately, a well-designed and practical agenda places negotiator in a highly advantageous position during negotiations.

C. Bargaining power

The negotiating power of the parties is a crucial aspect of the negotiation process. It is defined as the relative ability of the parties in an argumentative situation, such as drafting a contract, to influence the other party to achieve favorable terms.

Various theories address negotiating power, but it is especially significant in situations where there is a disparity between the parties, such as in consumer contracts. Consequently, courts and similar forums are diligent in considering the imbalance in bargaining power when examining these cases, ensuring that the interests of the weaker party are adequately protected.

iii. Phases of Negotiations

A. Negotiation Styles

There are different styles of negotiation. Style of negotiation is also a strategy. A person's negotiation style is reflected in their communication skills, interpersonal behaviour, language, tone, non-verbal cues, and listening skills.

Competitive/Positional-Based Negotiation- In the competitive model, the parties try to maximize their returns at the expense of one another, will use a variety of methods to do so and view the interests of the opposing party or parties as not being relevant, except insofar as they advance one's own goal of maximizing returns. Competitive bargaining has been criticized for its focus on specific positions rather than attempting to discern the true interests of the parties. Among the criticisms which have been levelled at the competitive model are its tendency to promote brinkmanship and to discourage the mutual trust which is necessary for joint gain.

A **'rights-based'** approach focuses on the legal rights of the parties and attempts to achieve a resolution which meets the relevant legal criteria of the dispute in a manner that is consistent with resolutions achieved in a traditional court setting.

Cooperative/Interest-Based Negotiation - Cooperative or problem-solving negotiation starts from the premise that the negotiations need not be seen as a "zero-sum" situation, i.e., the gains of one party in the negotiation are not necessarily at the expense of the other party/ Common interests and values are stressed, as is the use of an objective approach, and the goal of the negotiations is a solution that is fair and mutually agreeable.

An **'interest-based'** approach focuses on the underlying needs or interests of the parties and encourages a broader range of solutions or resolutions to the dispute which address the underlying interests, business or otherwise, of the parties instead of, or in addition to, legal interests.

B. Multiparty negotiations

As demonstrated, negotiation is a complex process with many uncertainties, both from the perspective of the negotiator and the parties involved.

This complexity increases significantly when multiple parties are involved in the negotiation process. In the context of international law, managing such a process can be an almost insurmountable challenge. Similarly, in international private law or international business law, the involvement of numerous parties can make negotiations exceedingly cumbersome.

For the parties involved, it is crucial to select a reliable partner with aligned interests. Additionally, effective management of the negotiation process is essential due to the potential implications and complications arising from the participation of multiple parties.

C. Online negotiations

In modern times, especially following the pandemic, online negotiations have reached an unprecedented dimension. Whereas businesspeople once had to travel across continents for meetings to negotiate contracts, video conferencing platforms now enable many stages of negotiation to be conducted remotely.

Online or e-negotiation is mechanism for negotiating using electronic communications and other information and communication technology.

This shift offers significant advantages in terms of expenses and costs. However, it also has drawbacks. In-person meetings allow for the development of social connections, which are crucial for building trust and business relationships. Furthermore, face-to-face interactions provide the opportunity to observe body language, emotions, and negotiation techniques.

Despite these challenges, successful negotiations via online platforms require maximum concentration. It is essential to avoid multitasking, such as writing emails or engaging in other activities, during negotiations to ensure that the process is effective and focused.

D. Negotiation Tactics

Negotiating is an art that develops with practice and experience. For example, negotiating a contract as a company lawyer requires extensive knowledge of legislation, doctrine, and relevant information, which can be acquired through research or practical experience. Being in the role of a lawyer, whether as a negotiator or company counsel, is challenging, and decision-makers often rely heavily on your expertise. What should you do? Most of your work is accomplished through careful planning and selecting an effective strategy.

Planning involves thorough preparation, including analyzing the parties (or the opposition, if you are a company lawyer), considering interests, negotiating power, expected outcomes, and the positions of all parties involved. From successful planning, you can then move on to developing a strategy. As a negotiator, it is crucial to listen carefully, maintain a positive atmosphere, and remain focused on your strategic objectives to achieve success.

E. Skills and styles

As previously mentioned, negotiation skills are strengthened through practice and experience. While some of these skills can be acquired through literature or the writings of successful negotiators, such as Tracy⁴², nothing surpasses the value of practical experience gained by undertaking negotiation processes yourself.

Practical experience often involves learning negotiation skills the hard way, through lessons learned over time. Although this method has its advantages, it is essential to align the development of negotiation skills with work experience to maximize resources effectively.

Regarding negotiation styles, we have already highlighted the distinction between positional/competitive and cooperative/interest-based approaches.

F. Negotiation theory

The theory based on cooperation and common interests is more prevalent in transactions. This approach is favored because most negotiations commence in good faith, with both parties striving to achieve mutually satisfactory results. While it is acknowledged that parties may have antagonistic positions to protect their interests, it is generally true that most transactions begin with a focus on common interests.

In line with this perspective, negotiation theory has evolved, with Harvard defining it as a theory focused on interests. This theory anticipates and addresses biases and aims to reach an agreement that benefits all parties involved⁴³.

There are three negotiation theory principles that may be especially helpful in efforts to negotiate solutions to many problems:

- Focus on interests. Interest-based bargaining, which involves exploring the deeper interests underlying negotiators' stated positions, can help parties identify potential trade-offs and opportunities for joint gains.

⁴² For top negotiators see at: <https://globalgurus.org/negotiation-gurus-top-30/>

⁴³ See at: <https://www.pon.harvard.edu/tag/negotiation-theory/>

- Anticipate and address sources of bias. Under the best of conditions, we are all prone to predictable biases and other cognitive errors. For instance, in-group bias can keep us from allocating resources equitably across groups.
- Reach agreement within and across parties. For every agreement we reach, a host of other agreements is often needed. Many crisis and business negotiations often require multilateral bargaining.

Negotiation theory suggests you focus on interests, not positions; separate inventing from committing; invest heavily in “What if?” questions; insist on objective criteria; and try to build nearly self-enforcing agreements.

G. Principled Negotiation

Principled Negotiation⁴⁴ directs that:

[...] you look for mutual gains whenever possible, and that when your interest's conflict, you should insist that the result be based on some fair standards independent of the will of either side [...]. Principled negotiation shows you how to obtain what you are entitled to and still be decent.

The focus on preserving relationships and achieving mutually beneficial agreements, and the high success rates of principled bargaining settlements make it a desirable model for lawyers to adopt during negotiation. It is important that they recognise its limitations in the contexts outlined above and are willing to adapt accordingly.

- Separates problem from people
- Focuses on interests do not position
 - Explore interests
 - Avoid bottom lines
- Creates variety of options
- Insists results are based on objective criteria

a. Distributive Bargaining

A customary, traditional method of bargaining where the parties are dividing or allocating a fixed resource (i.e., property, money, assets, company holdings, marital estate, probate estate, etc.). Distributive bargaining is often referred to as “zero sum game”, where any gain by one party results in an equivalent loss by the other party. In distributive bargaining the parties may not necessarily understand their own or the other’s interests and, therefore, often creative solutions for settlement are not explored. It could lead to a win-lose result or a compromise where neither party is particularly satisfied with the outcome.

The two forms of distributive bargaining are:

Negative consequences of Distributive Bargaining are:

1. By taking rigid stands the relationship is often lost.
2. Creative solutions are not explored, and the interests of both parties are not fully met.
3. Time consuming
4. Both parties take extreme
5. positions often resulting in impasse.

⁴⁴ Roger Fisher and William Ury, *Getting to Yes*, pp. 11-12.

In distributive bargaining, one's gain is the most important issue. The tactics used can be irrational, emotional, or even unethical. Some of the tactics used in distributive bargaining are described below: Bluffing; Delays; Snow Job; Temper Tantrums; Limited Authority

b. Integrative Bargaining

Integrative Bargaining is an extension of Interest Based Bargaining. In Integrative Bargaining the parties "expand the pie" by integrating the interests of both parties and exploring additional options and possible terms of settlement. The parties think creatively to figure out ways to "sweeten the pot", by adding to or changing the terms for settlement.

Focus on Interests not Positions: "Positions" are "what" negotiators say they want; "interests" are "why" they take the positions. The interests of the opposing party are discovered by asking questions and putting yourself in the other's shoes. This creates an opportunity to devise solutions that address these underlying interests. Although problem-solving negotiators may be willing to disclose their interests, be aware that competitive negotiators will try to learn your interests without revealing their own to gain an advantage.

Expanding the Pie (i.e. Create Value): Sometimes it is possible to brainstorm and increase the resources to be bargained for. If the resources can be increased then perhaps both sides can get what they want or at least find a sufficiently satisfying alternative. For instance, a cell phone retailer may not decrease the price but might be willing to throw in voicemail and call display into a plan package for the same cost.

Open Information Exchange: This involves freely and honestly disclosing information to help the other side understand your underlying interests, objectives, and priorities. Sometimes something critical to one side is a minor concession to the other, and vice versa.

Log Rolling: If two or more issues are in dispute, the negotiators may be able to do a series of trade-offs. One side gets their top priority on the first issue and the other side gets their top priority on the second issue.

Objective Criteria: Instead of allowing the negotiation to be determined by a contest of power or to become a battle of wills, negotiators can select one or more objective criteria which can be used as standards for a 'fair' settlement (e.g., market price).

To put it simple, **"Everybody wins"**.

H. Lawyers' perspective and adversarial approach

The role of lawyers in negotiations, particularly their perspective and adversarial role, is a subject of serious debate in both writings and literature.

In many practical cases, some parties strongly contest the involvement and interests of lawyers. One perspective argues that lawyers operate in a manner that creates disputes, which they then resolve themselves. While there is some merit to this viewpoint, numerous cases highlight the importance and necessity of lawyers in negotiation processes.

From the initial contact and discussion of terms to drafting agreements and finalizing contracts, the presence of lawyers undeniably facilitates the negotiation process and contributes to the successful conclusion of negotiations.

I. No-negotiation style

It has been established that contracts, particularly commercial contracts, should be negotiated exhaustively to establish a healthy and worry-free contractual relationship.

We have discussed various techniques, styles, strategies, and other aspects of negotiation.

However, some authors argue that certain contracts do not require negotiation. What types of contracts might these be?

For instance, transactions of small value are often not negotiated by the parties involved, as this approach saves valuable financial resources. Is this the correct approach?

Another perspective is that not all contracts should be negotiated. For example, general conditions of contracts and non-disclosure agreements often do not necessitate negotiation.

J. Position bargaining

The parties enter negotiations with their expectations based on the stakes and objectives. However, there is a type of negotiation known as positional negotiation, where one party starts with a high negotiating position while the other begins with a low position.⁴⁵

During the negotiations, expectations are adjusted, and both parties make concessions until an agreement is reached or negotiations fail. Due to the rigid stance of one party in positional talks, the other party often feels inferior or under-represented. As a result, negotiators generally do not prefer this type of negotiation.

K. Negotiation closure

The issues outlined above ultimately aim to conclude the negotiations successfully, culminating in the formation of a contract.

The negotiation can end in four possible ways: No agreement.; victory for one party; a simple compromise - defined as some middle ground on an obvious dimension connecting the two parties' initial offers (Pruitt 1981) or a win-win ("integrative") agreement in which the parties achieve higher joint benefit than they could with a compromise agreement, >It is generally believed (e.g. Pruitt 1981) that win-win agreements are longer lasting and more beneficial for the relationship between the parties than simple compromises.

Quiz

A successful conclusion of the negotiations should inevitably lead to a mutually beneficial agreement for all parties involved. However, this raises the question: how can the negotiation process end differently?

What happens if the negotiations fail, and what are the subsequent steps?

As a negotiator or company lawyer, what would you suggest if the negotiations fail?

What actions should you take next?

Unit two: Mediation

Mediation (private or institutional) is an ADR method, that operates outside the judicial system and is conducted voluntarily by the parties involved. Mediation sits next to negotiation at the far end of the dispute resolution spectrum. It is after all, an assisted negotiation and is only sensible if direct negotiation fails.

⁴⁵ Ibid..

The Centre for Effective Dispute Resolution (CEDR) has defined mediation as a “flexible process conducted confidentially in which a neutral person actively assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution”⁴⁶.

According to Black’s Law Dictionary mediation is “the act of a third person who interferes between two contending parties with a view to reconcile them or persuade them to adjust or settle their dispute.”

Riskin defines mediation as “a process in which an impartial third party, who lacks authority to impose a solution, helps others resolve a dispute or plan a transaction.”

Unlike court proceedings, where a judge renders a decision, mediation allows the parties to reach their own resolution. In this process, the parties select one or more impartial mediators to assist them in finding a mutually satisfactory solution. Mediation is typically faster, more straightforward, and more cost-effective compared to traditional court proceedings. The mediator has no advisory or determinative role but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.

i. Advantages and disadvantages of Mediation

The mediation process is characterized by its flexibility and informality. Legal representation is not required during mediation; however, some parties may choose to involve legal counsel for added comfort.

A neutral third party assists parties in reaching a voluntary, mutually beneficial solution. Compliance to agreement reached in a mediation process is largely because of the workable and implementable nature of these outcomes as well as the fact that the same includes the Parties’ interest.

Mediation involves direct participation from the parties, allowing them to engage actively in the negotiation process. It also enhances the potential for maintaining ongoing relationships between the parties. A mediated settlement that addresses the parties’ interests can often preserve relationship in ways that would not be possible in a win/lose decision making procedure.

ii. Comparison of Mediation and other ADRs

Each alternative dispute resolution mechanism presents distinct advantages and disadvantages.

As previously discussed, mediation emphasizes negotiation over adjudication. Mediation sits next to negotiation at the far end of the ADR spectrum it is after all an “assisted negotiation”. Mediation is consensual process and, unless other processes introduce a consensual stage it is the only process that allows parties to shape their own settlement. In this process, the mediator facilitates discussions while the parties involved have the autonomy to establish the terms of their agreement directly.

Mediation is flexible, as it operates with minimal intervention from state institutions.

In contrast to litigation or arbitration, mediation requires active participation from the parties themselves. Furthermore, unlike court adjudication and, in some jurisdictions, arbitral awards, a mediated agreement is final and cannot be appealed.

⁴⁶ CEDR Model Mediation Procedure 2022 Edition available at: <https://www.cedr.com/wp-content/uploads/2022/05/CEDR-Model-Mediation-Procedure-May-22.pdf>.

Additionally, mediation provides an optimal environment for the parties to engage in direct communication, with the mediator present to assist in the process.

As previously noted, there are numerous similarities between mediation and conciliation.

These similarities extend further to mediation and negotiation.

However, distinct differences also characterize these two forms of ADR.

Firstly, negotiation is the most flexible method among all ADR forms, as it is entirely under the control of the parties involved. While mediation is also guided by the parties, it involves a neutral mediator who facilitates the process.

Another distinguishing feature of negotiation is the absence of predetermined rules, unlike mediation, which typically operates under established institutional mediation rules.

Communication in negotiation is direct, whereas in mediation, it is facilitated by the mediator.

Regarding confidentiality, parties in a negotiation are not legally bound, and information may be used in court. In contrast, mediation generally ensures confidentiality.

Negotiations conclude with a legally binding agreement, whereas mediation outcomes must undergo enforcement procedures.

Additionally, negotiations do not adhere to a set timeframe, while mediation processes are generally shorter than negotiations.

Are mediation and conciliation the same?

Mediation and conciliation are often terms used interchangeably.

Conciliation is a process in which the parties to a dispute, with the assistance of a third party neutral (the Conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The Conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The Conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.

Conciliation is fundamentally different from mediation because the conciliator plays a relatively direct role in the actual resolution of the dispute and even advises the parties on certain solutions by making proposal for settlement. The conciliator does not have to follow a structured negotiation process such that is used by a mediator, instead administering the conciliation as a traditional negotiation, which may take different forms depending on the case.

iii. Principles of Mediation

Voluntariness: The mediation procedure is conducted based on the voluntary participation of the parties, as expressed both orally and in writing, by prevailing legislation.

In mediation, all parties are treated equally and possess rights and obligations as stipulated by the applicable laws.

Neutrality & Impartiality: The mediator aims to be neutrality and impartiality throughout the mediation process. The mediator has an equal and balanced responsibility to assist each mediating party and cannot favour the interests of any one party over another, nor should the mediator favor a particular result in mediation.

Confidentiality: The mediation process is private and, in principle, confidential. Public access is excluded, and statements or information related to the mediation cannot be used as evidence in other proceedings without the parties' consent. The mediator, the parties, and their representatives are required to uphold confidentiality unless the parties collectively agree otherwise. The mediation agreement may be made public only with the parties' consent and or by relevant legislation.

iv. The Legal Basis of Mediation

As outlined above, the legal framework for mediation in the United Republic of Tanzania is established by its Constitution, Civil Procedure Code, and other statutory laws. There are several strands of mediation in Tanzania: court -annexed mediation; labour mediation, community mediation and private mediation.

v. The Court-Annexed Mediation Stages in Tanzania

In the Tanzanian context, the court-annexed mediation process has been governed by newly approved Guidelines as of 2024.⁴⁷ These guidelines regulate the mediation process and delineate the stages involved. According to these guidelines, the mediation procedure includes the following stages⁴⁸:

- Selection of the mediator
- Notification of selection
- Communication of submissions to the mediator
- Disclosure
- Withdrawal and replacement of the intermediary
- Mediation procedure
- Obligations of the mediator

The principal stages within the mediation procedure in the United Republic of Tanzania are:

1. Introduction
2. Opening statement
3. Exploring options and developing consensus
4. Conclusion

vi. The Mediation Stages According to Best Practices

From the extensive sources consulted for this Module, it is evident that institutions and organizations employ varying frameworks to categorize the stages of mediation, influenced by relevant legislation and practices. Consequently, selecting one framework over another may not be appropriate.

With the above said, this module aims to provide participants with a comprehensive understanding of various mediation practices, extending beyond court-annexed mediation to include local and international approaches involving private parties and accredited mediators.

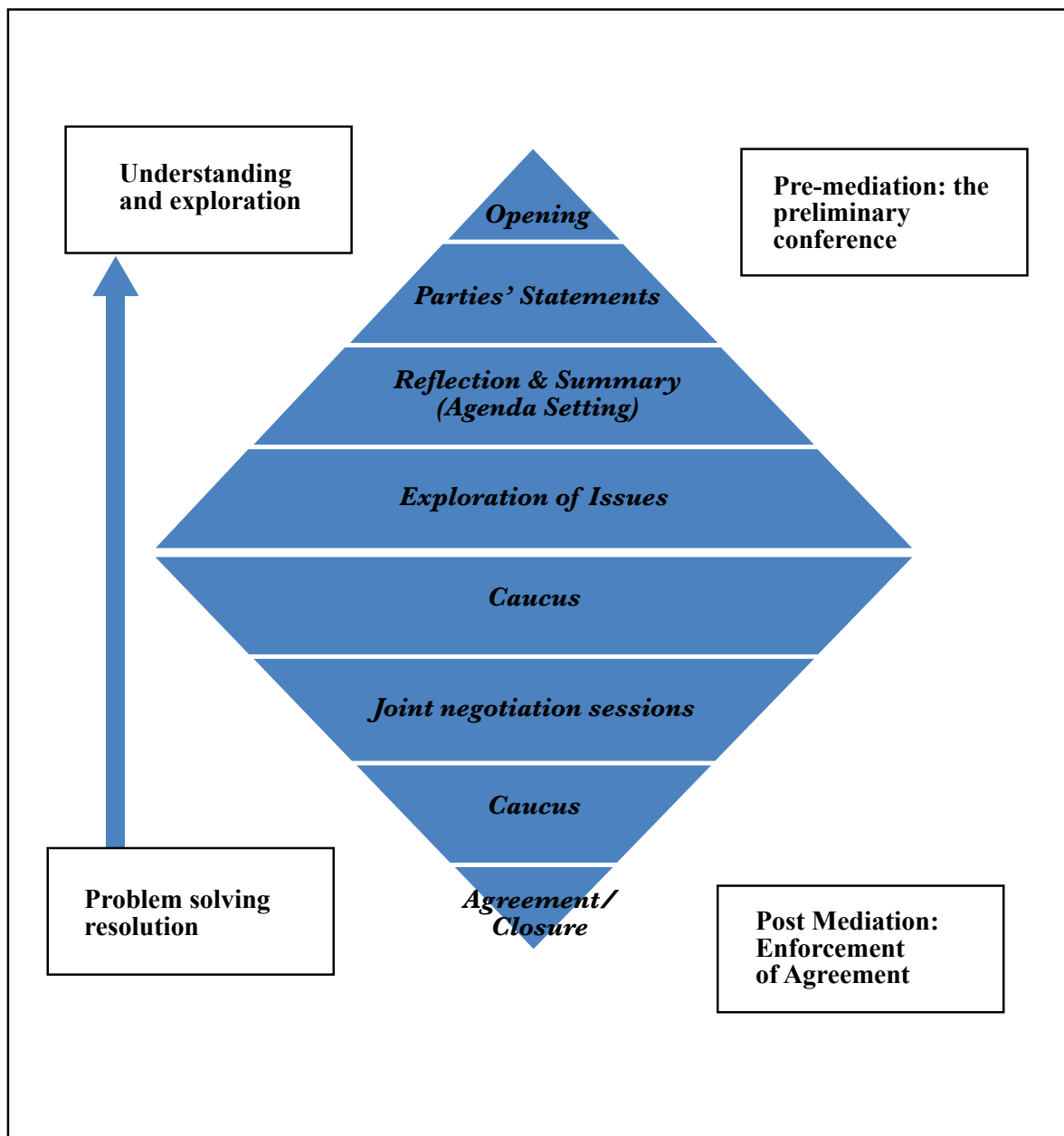
To achieve this, the module will explore a range of mediation practices, highlighting essential elements of mediation processes without confining the discussion to a single system or specific categorization of mediation phases. This approach is designed to enhance participants' skills in out-of-court mediation, equipping them to effectively manage more complex mediation scenarios.

⁴⁷ Paragraph 10.4.1. – 10.4.4. of the Court Annexed Mediation Guidelines, 2024, The United Republic of Tanzania – Judiciary of Tanzania.

⁴⁸ Ibid, pp. 7-9

The stages outlined below are categorized based on research and are tailored for international mediation. However, these stages can also be effectively applied in non-court-annexed-mediation contexts.

The Mediation Process



A. The Proposal to Mediate and Appointment the Mediator

In principle, for parties to have the right to refer a matter to alternative dispute resolution, there must be a corresponding clause in their agreement. In commercial agreements, the dispute resolution clause frequently provides for methods such as negotiation, mediation, and arbitration.

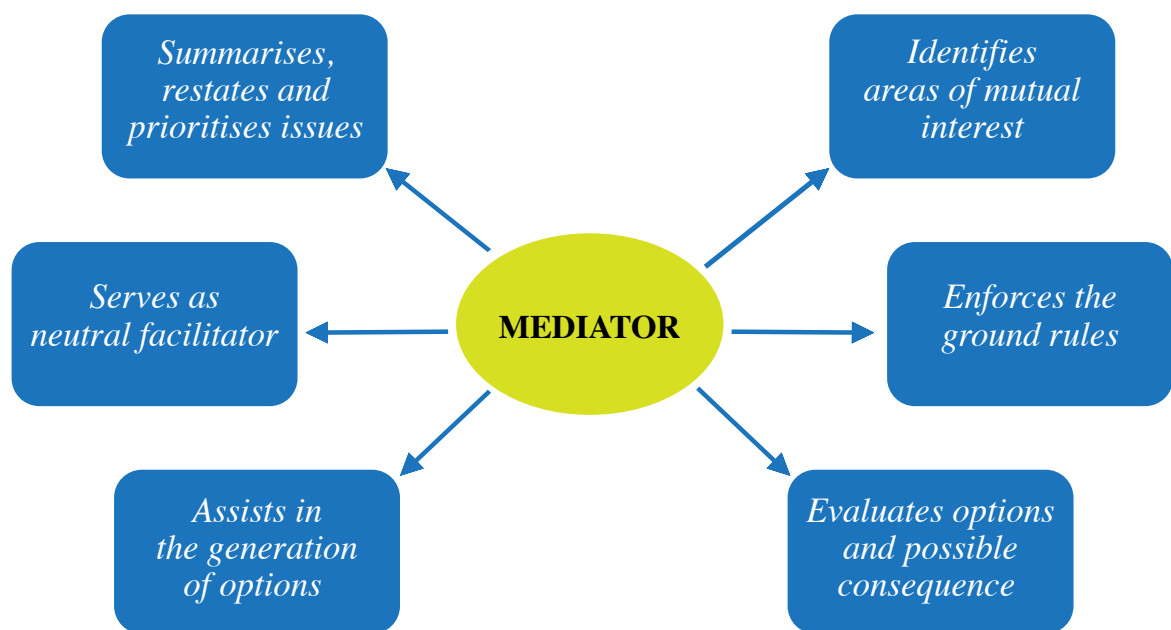
Once a valid mediation agreement is in place, the initiating party must submit a notice or request for mediation. At this point, the proposal for mediation is deemed to have been made. Depending on the system in use, the parties will then contact either licensed or accredited mediators or those listed on an approved reference list.

However, there are circumstances where parties, such as those in commercial contracts, have not included a mediation or arbitration clause but have instead designated a competent court for dispute resolution. In such cases, can the parties, upon the emergence of a dispute, opt for alternative dispute resolution mechanisms rather than court proceedings?

Internationally, legal frameworks often permit parties, with a valid agreement, to relinquish court jurisdiction in favor of alternative dispute resolution forums. What is the position regarding this practice in the United Republic of Tanzania?

a. Mediator's role

For all trained and accredited mediators, as well as those possessing relevant skills, their role is clearly that of facilitators, or “enablers” as commonly termed.



Even though many mediators may be guided by common professional standards, they do not adhere to a uniform approach to conducting mediations. They can embrace a varying mix of mediation philosophies. There are different types of mediation.

1. **Facilitative:** The “purest” form of mediation is facilitative mediation where a mediator helps the parties to find their own solution. In facilitative mediation, the mediator structures a process to assist the parties in reaching a mutually agreeable resolution.
2. **Evaluative:** Evaluative mediation is more commonly invoked in situations involving complex factual scenarios. In such cases, the parties lack a clear mutual understanding of what arguments are likely to be successful or unsuccessful under currently prevailing case and statutory law and/or legal doctrine. An evaluative mediator assists the parties by providing a level of clarity that will position them to negotiate a resolution to their dispute that avoids more costly and contentious adversarial litigation. An evaluative mediator might make formal or informal recommendations to the parties as to the outcome of the issues. Evaluative mediators are concerned with the legal rights of the parties rather than needs and interests and evaluate based on legal concepts of fairness.

- 3. Transformative:** This the newest type of mediation is based on the values of “empowerment” of each of the parties as much as possible, and “recognition” by each of the parties of the other parties’ needs, interests, values and points of view.

The mediator’s role should be strictly focused on facilitating the exploration of potential resolutions to a dispute. While the skills and abilities of mediators may vary and evolve, it is crucial to distinguish their essential roles from those of judges, arbitrators, or negotiators.

Table: Mediation Approaches

	Evaluative	Facilitative /Interest based	Transformative
<i>Mediated interaction</i>	Competition for most persuasive legal position	Conflict over competing interests	Conflict as a failure to recognize fellow humanity
<i>Type</i>	Establish and apply precedent	Focus on interests	Provide opportunities for mutual empowerment and recognition
<i>Recommended practice</i>	Provide parties with an assessment	Move parties from positions to interests	Encourage and reinforce instances of empowerment and recognition

b. Qualifications of mediator

Mediators with backgrounds as judges, lawyers, or other legal professionals are typically regarded as highly competent in the field of mediation.

The qualifications for mediators vary across different countries and legal systems.

In Tanzania, for instance, the Code of Civil Procedure stipulates that to be eligible for nomination as a mediator, individuals must be judges, registrars, magistrates, individuals with relevant qualifications and experience chosen by the parties, or retired judges or magistrates.⁴⁹

The law requires ADR practitioners who practice at a fee to be accredited. For accreditation as negotiator or mediator the following requirements must be met pursuant to Regulation 5 of Reconciliation, Negotiation, Mediation and Arbitration (Practitioners Accreditation) Regulations (G.N. No. 147 of 2021):

- (a) *has a proven record of amicably settling disputes in the community for a period of not less than five years’ experience.*
- (b) *is an advocate within the meaning of the Advocates Act having at least five years of experience as a practicing Advocate.*
- (c) *is a member of an allied association having at least five years’ experience as a practicing professional; or*
- (d) *is a holder of a bachelor’s degree or its equivalent from a recognized institution having at least five years’ experience in field of telecom, information technology, intellectual property rights or any other specialized areas in the public service or private sector.*
- (e) *has not been convicted of a criminal offence and sentenced to imprisonment for a period of not less than six months.*
- (f) *has not been found guilty of an offence involving. professional misconduct.”*

In other countries, mediation is often decentralized and organized around specialized areas. Common Law jurisdictions exhibit greater flexibility regarding mediators’ qualifications. In these countries, individuals can be included on the roster of mediators by obtaining certification and accreditation from government-approved programs.

⁴⁹ Order VIII Rule 25 of the Civil Procedure Code (CPC).

Furthermore, it is not mandatory to have a narrowly defined legal background to serve as a mediator.

c. Mediator's Agreement

Mediators are connected to their institutions within the framework of which they provide mediation services save for ad-hoc mediations.

Many institutions engage these mediation services through formal contracts. These service contracts are governed by the obligations relationships and are specifically between the institution and the mediator. In Tanzania, however, formal contracts are not utilized in mediation processes. Instead, mediators enter into mediation agreements with parties upon their appointment through an institution. Typically, mediators are members exclusively of that institution or panel.

ICC Mediation Clause (ICC Mediation Rules):

'The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC Mediation Rules.'

CEDR Model Mediation Clause:

'If any dispute arises in connection with this agreement, the parties agree to enter into mediation in good faith to settle such a dispute and will do so in accordance with the CEDR Model Mediation Procedure. Unless otherwise agreed between the parties within 14 days of notice of the dispute, the mediator will be nominated by CEDR.'

In some instances, it has been observed that mediators also enter into direct agreements with the parties involved. These contracts typically outline the roles and responsibilities of each party, including the fee structure.

d. Appointment of mediator

The appointment of mediators in institutional mediation is primarily governed by the relevant mediation rules.

For instance, the International Chamber of Commerce Dispute Resolution Services stipulates that the parties may jointly nominate a mediator. If the parties fail to make a joint nomination, the Centre will appoint the mediator after consulting with the parties.⁵⁰

Prior to appointment, the mediator is required to sign a declaration affirming their acceptance, availability, impartiality and independence.⁵¹

When a mediator is proposed outside the institution's reference list, it is essential to approach such nominations with careful consideration rather than dismissing them solely based on their absence from the list.

The credentials of the proposed mediator should be thoroughly evaluated, including their nationality, language skills, training, qualifications, and relevant experience. This evaluation should be conducted with the understanding that the mediator must also be available to oversee the mediation process.

Another, although less common question is whether the parties should select a sole mediator or co-mediator. While parties typically select a single mediator, selecting co-mediators may be attractive in complex, multi-party cases and cross-cultural issues.

⁵⁰ Article 5 of the Mediation Rules of the International Chamber of Commerce (2014)..

⁵¹ Ibid.

e. Neutrality of the mediator

The concepts of perceived neutrality and neutrality itself are subjects of extensive theoretical discussion.

Examination of the rules of leading institutions that conduct mediation procedures reveals that they generally do not provide extensive definitions of mediator neutrality. This is because the selection process for mediators typically involves rigorous scrutiny before they are included on the institution's list.

In practice, however, neutrality implies that a mediator should not have any conflicts of interest with the parties involved and should remain 'disinterested' in their circumstances.

However, maintaining neutrality can be challenging, particularly when mediators are expected to empathize with the parties' situations. This raises the question of how to balance these potentially conflicting demands.

The dilemma was addressed by Stulberg, who among others, asserted that the mediator must be neutral for the negotiated outcomes but not neutral to the process.⁵²

B. Role of Lawyers in Mediation

In principle, lawyers play a proactive role in all forms of alternative dispute resolution, including mediation. A lawyer (advocate) shall consider the appropriateness of alternative dispute resolution (ADR) to the resolution of issues in every case and inform the client of ADR options and advantages and, if so instructed, take steps to pursue those options as required under Regulation 59 of the Advocates (Professional Conduct and Etiquette) Regulations 2018⁵³. The basis for that obligation is that the client simply cannot make an informed decision about his case unless he understands the ADR options that might be available.

The legislative framework influences the specific role of lawyers, ethical standards governing legal practice, and the authorization given by the parties for legal representation.

Since mediation differs in nature from other mechanisms such as arbitration, lawyers must adapt their approach to align with the mediation process.

Both lawyers and the mediation parties must act in good faith, adhering to ethical standards, confidentiality requirements, and all directives issued by the mediator.

In some cases, communication regarding the mediation process has been exclusively managed through the lawyer until the mediation concludes with a settlement agreement.

Furthermore, lawyers are responsible for preparing the parties, identifying critical issues, and devising strategies to achieve the best possible outcome for their clients.

C. Choice of Venue

The parties will also be required to determine where the mediation sessions are to be held.

In mediations involving parties from the same country, the choice of mediation venue typically holds limited significance. However, when the parties are from different countries, the venue gains increased importance due to considerations of "home turf" and logistical implications. More crucial, though, is the effective enforcement of the mediated settlement agreements.

It is common for mediation agreements to omit specifics regarding the venue of the mediation. As a result, the role of the institutions or centres administering these procedures becomes more critical.

⁵² Joseph B. Stulberg, "The Theory and Practice of Mediation: A Reply to Professor Susskind", Vermont Law Review (1981), pp. 94..

⁵³ G.N. No. 118 of 2018.

The International Chamber of Commerce addresses this by stipulating that, in the absence of an agreed-upon mediation venue, the centre will designate the location and arrange the mediator's physical meetings with the parties.⁵⁴

D. Fixing the Agenda and Gathering Information

Establishing the agenda, while a technical matter, is crucial for effective planning and successful mediation.

The agenda serves to inform the parties about the procedural timeline and the dynamics of the mediation process.

Information for the agenda is gathered through communication with the parties or their representatives.

The mediator is responsible for preparing the agenda in a neutral and unbiased manner to ensure that the parties are not influenced or disturbed.

Additionally, the mediator should frame contentious issues as general topics to facilitate a constructive approach to problem-solving.

a. Drafting an agenda for negotiations

Establishing a structured process and meticulously preparing an agenda are crucial steps in the mediation process. Each agenda item should be clearly defined with specific time allocations, which helps focus discussions solely on agenda items and accelerates decision-making.

Additionally, openness to feedback and attentive listening to all participants are essential. Actively listening and seeking clarification on unclear points are equally important. Ultimately, a well-designed and practical agenda places mediator in a highly advantageous position during mediation.

b. Active listening

Active listening is a fundamental prerequisite for effective mediators.

Engaging in active listening and seeking clarification on ambiguous points are critical practices, as they demonstrate the mediator's control over the process and ensure that the parties feel their concerns are being heard and respected.

However, the mediator must also maintain a balance between active listening and the rationalization of discussions and arguments.

c. Communication in mediation

Successful mediation processes are characterized by efficient and transparent communication.

The way effective communication is established with the parties provides significant insight into the mediator's approach. Open communication, active listening, careful information sharing, and attentiveness to non-verbal cues collectively constitute the essence of communication in mediation.

Common techniques employed by mediators include summarizing, reframing, reflecting, encouraging, restating and occasionally, employing silence.

⁵⁴ Article 4 of the Mediation Rules of the International Chamber of Commerce (2014)..

E. The Mediator's Opening Statement

Experienced mediators begin their opening statements with impactful positions designed to capture the attention of the parties involved.

The primary objective at this stage is to establish a safe and non-threatening environment for the participants. In their initial discussions, mediators provide the parties with a memorandum outlining the procedural conduct of the mediation.⁵⁵

By clearly defining the “rules of the game,” mediators must consider the parties’ requests and ensure that they are treated with fairness and impartiality.

As previously emphasized, the parties need to engage in the mediation process in good faith.

F. Parties' Opening Statement

The mediation process by nature is more flexible and not bound by rigid rules, unlike arbitration or litigation.

For instance, the International Chamber of Commerce allows the mediator discretion in determining the approach to initiating and conducting the mediation process.⁵⁶

Conversely, the Mediation Guidelines of Tanzania outline specific provisions related to the parties’ opening statements.⁵⁷

The opening session of mediation represents the initial point of direct interaction between the parties and is often charged with significant emotional undertones. This is particularly true for the party that initiated the mediation process. Typically, the opposing party or their representatives will seek to clarify their legal position while minimizing their exposure in the dispute.

The most effective opening statements are those where the parties address each other directly rather than through their representatives. Successful statements are characterized by genuine communication and respect towards the opposing party.

G. Identifying Issues and Interests

The involvement of a neutral third party in the mediation process indicates that the parties have been unable to resolve their conflicts independently. Central to mediation is addressing the interests of the parties, which may include financial, monetary, personal, or other matters.

A successful mediator creates a comprehensive list of issues and interests pertinent to the dispute.

While many issues can be identified, we will focus on a checklist provided by Dermote. According to Dermote⁵⁸, common interests that may arise during the mediation process include financial considerations, time management, security, tax implications, performance expectations, future relationships, reputation, confidentiality, litigation risk, and personal matters

⁵⁵ Ibid, Article 7.

⁵⁶ Ibid, Article 7.

⁵⁷ Paragraph 10.4.2. of Court Annexed Mediation Guidelines, 2024.

⁵⁸ See more at: www.mediate.com.

a. Highlighting issues and topics by the mediator

The issues and topics have been addressed previously. While the identification of the primary issues was discussed earlier, this section focuses on mediation topics.

These topics are crucial for defining the scope of the mediation process. By systematically reviewing these topics, the mediation process can be effectively managed, ensuring that it remains within the established framework and adheres to the planned objectives.

Once the topics have been identified, those that align with the interests of the parties and the mediation process should be prioritized.

This involves directing the negotiating discourse towards well-defined and rationally structured topics.

b. Legal analysis as the basis for the parties

It has been established that the mediator must be well-informed about the subject matter of the mediation and conduct a comprehensive analysis of the case. A key component of this analysis is the legal aspect, which should be clearly understood by the mediator.

However, this understanding does not imply that the mediator should devise a solution to the dispute. Instead, the mediator should be prepared with a thorough legal analysis.

While it is common for one party to have a stronger legal position, the mediator's awareness of these factors is instrumental in facilitating the development of a mutually acceptable agreement for both parties.

c. Identifying and responding to different values, cultural norms, and biases

The drafters of this module, drawing upon their extensive experience, have observed a wide array of cultures, values, and traditions in alternative dispute resolution processes.

A consistent factor is that the culture of the parties involved influences the values, style, and manner of communication in the mediation process.

For some cultures, mediation is viewed as a process of reconciliation and alignment of perspectives. In contrast, other cultures may perceive mediation as a process involving antagonisms, which are not necessarily negative.

As a result, mediators from different cultural backgrounds may experience biases and prejudices that could impact both the mediation process and its outcomes.

The opposite of this approach—marked by tolerance and open-mindedness—can be cultivated through education, understanding of diverse cultures, reading, and above all, respect for cultural diversity.

d. The Mediator's intervention strategies

Given that mediation is less interventionist than other forms of dispute resolution, it is important to recognize that there are situations where the mediator may need to employ specific strategies.

The mediation rules reviewed do not mandate any particular strategic approach; rather, the choice of strategy is influenced by the mediator's preferences and the dynamics of the parties involved.

As a result, strategies such as compromise and interest-based negotiations can be considered targeted approaches tailored to the needs of the mediation process.

Relationship between the mediator and parties

The relationship between the mediator and the parties has now been established and discussed.

It is advantageous for both parties and the mediator to have prior knowledge of each other, as this familiarity helps in understanding each other's perspectives.

Furthermore, steps should be taken to enhance trust among the participants in the mediation process.

When parties trust the mediators and review the mediation report, it establishes a solid foundation for advancing to the next stage of mediation.

Implementing these measures to foster a positive mutual relationship will yield beneficial outcomes throughout the mediation process.

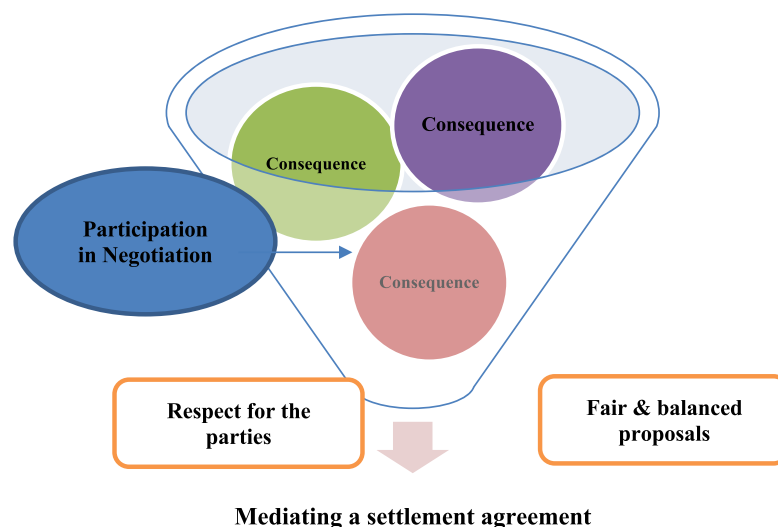
f. Decision-tree analysis

In challenging mediation cases where achieving a resolution appears difficult, mediators continuously seek new methods and tools to overcome obstacles, particularly in complex and seemingly futile negotiations.

One widely employed method is decision analysis, also known as decision tree analysis.

Mark B. Victor, an authority in the field, advocates for the use of decision tree analysis as an effective tool for persuading parties to resolve issues within reasonable terms. According to Victor, this method aids in evaluating the process by eliminating trivial elements and facilitating a more timely and effective settlement agreement.⁵⁹

Below is a diagram illustrating the interaction of actors in the mediation procedure, based on decision-tree analysis.



⁵⁹ Mark B. Victor, "Decision Tree Analysis: A Means of Reducing Litigation Uncertainty and Facilitating Good Settlements," 31 Ga. St. U.L. Rev (2015), p. 2..

H. Generating Options for Settlement

Who is responsible for proposing options in the mediation procedure? This role typically falls to the mediators, given their central position in the process.

In this role, mediators must thoroughly understand the underlying interests of the parties involved, which often go beyond superficial concerns.

These interests should be translated into options for the parties and categorized based on their significance.

Once these options are refined and presented, the goal is to reach a negotiated mediation agreement within this framework.

Therefore, mediators can introduce substantive and relevant options that may better serve the parties before initiating the settlement proposal.

a. Agreement-in-principal approach

In both negotiation and mediation, the parties may reach an “agreement in principle,” outlining the primary terms of the agreement.

Generally, it is not uncommon for parties to mistakenly believe that the main issue has been resolved at this stage and to become complacent. This approach can be problematic, as difficulties often arise during the subsequent phase of drafting the final agreement.

From the perspective of the neutral facilitator, it is crucial that the parties remain diligent at every stage and advocate for their terms to be accurately reflected in the final negotiated agreement.

Ultimately, the “agreement in principle” is a valid approach, provided that the parties are acting in good faith throughout the process.

b. The mediator’s right to propose a settlement

Is it advisable for a mediator to propose a settlement?

Opinions on this matter vary, but the prevailing view is that mediators should generally refrain from proposing settlements in certain areas.

Primarily, the mediator’s role is to remain neutral, facilitating the exchange of perspectives and addressing the conflicting positions of the parties.

Additionally, if mediation fails, the mediator who proposed the settlement may be held responsible for the failure.

Proposing a settlement can undermine the mediator’s perceived neutrality, impartiality, and independence, which are crucial to the mediation process.

A more discreet approach is for the mediator to receive confidential information from the parties regarding their true positions and bottom lines. The mediator can then use this information to guide the negotiation process without directly proposing a settlement, working towards an agreement in a neutral capacity.

Therefore, it is generally preferable for mediators to limit their proactive involvement in proposing settlements.

c. Mediator as a catalyst for creativity

There is a paradoxical situation concerning mediation and the role of creativity within the mediation process, particularly when encouraged by the mediator.

According to Evan Ash, fostering creativity can risk exposing the parties' thoughts, which may lead to a deeper understanding of what they think and their positions.⁶⁰

Despite this paradox, it is evident that mediators with high levels of creativity offer more and better solutions for consideration. As the title suggests, a creative mediator can catalyze reaching a mediation agreement.

d. Zone of possible agreement

In the theory and practice of mediation, there exists an area where the parties' interests or objectives intersect.

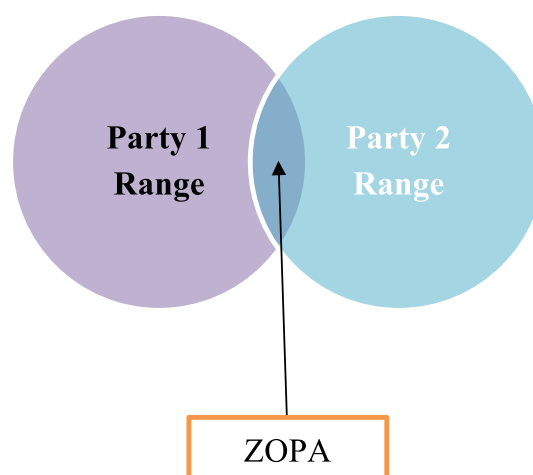
This area is referred to as the "Zone of Possible Agreement" (ZOPA). Emily Holland defines ZOPA as a negotiation space where the parties are likely to reach an agreement, representing the overlap between predicted and expected outcomes.⁶¹

To further illustrate the concept of the Zone of Possible Agreement, a diagram is provided below.

As depicted in the diagram, once the parties have begun proposing their terms, the mediator can identify the overlapping area (ZOPA) where the proposals converge. The mediator will then operate under the assumption that an agreement is attainable within this zone.

The question is whether participants can effectively develop and utilize this ZOPA in their negotiations.

Zone of Possible Agreement is the area where parties may find a common ground



⁶⁰ See more at: www.mediate.com/the-paradox-of-creativity-with-compassion-in-mediation.

⁶¹ See at: www.adrtimes.com/zone-of-possible-agreement-zopa

I. Signing of the Mediated Settlement Agreement or Termination of Mediation

Mediation procedures ideally culminate in an agreement that remains effective and relevant over time.

While the agreement doesn't need to be signed immediately, this often occurs because parties are motivated to finalize the terms promptly.

In less complex cases, such as a single payment or a full settlement of a dispute, reaching and signing the agreement is relatively simple. However, for more complex agreements, it may be necessary to include conditions or stipulations as part of the mediated resolution.

Once an agreement has been reached, professionals need to formalize the terms in writing. Key considerations include who is responsible for drafting the agreement, the extent of the parties' commitment to the terms, and how the process will be concluded. These topics will be addressed in the following sections.

Mediation is voluntary, and any party in mediation may terminate at any time. For institutional mediation, the termination of proceedings will be guided by the applicable mediation rules. According to the ICC Rules⁶², mediation proceedings end when parties have signed a settlement agreement to settle their dispute. Any party can terminate the proceedings at any time after the initial meeting with the mediator has taken place and the parties have received the mediator's note stating how the mediation will be conducted.

a. Drafting the mediated settlement agreement

As discussed, mediators are typically included on the lists of institutions and organizations for mediation based on regulatory criteria and qualifications.

From the analysis of the relevant rules, it is evident that not all mediators possess legal expertise or are qualified to draft legal documents. If mediators are not lawyers by profession, then they are not the most competent persons for preparing legal documents. This raises the question: who should draft the mediated settlement agreement?

Typically, lawyers who have participated in the mediation process are responsible for drafting the agreement. This task falls within their professional duties and is undertaken at the request of the parties involved. Drafting the agreement is more complex than merely recording the terms of the contract, and mediators need to refrain from assuming this role. Failing to do so could have implications for any potential litigation involving the parties.

In cases where no lawyer has been involved in the mediation, and the parties request that the mediator propose a draft agreement, the mediator may need to prepare a draft. However, this draft should be circulated to the parties and their legal representatives for review and feedback before it is finalized.

b. Parties' commitment to the settlement terms

Once signed, the agreement reached through mediation falls under the legal regime governing obligations.

In other words, the parties' commitment to the agreement is not merely discretionary, as it is agreed by contract.

Because mediation is a voluntary process in which the parties take responsibility for and create their own solutions, parties are more likely to abide by the terms of any agreement reached. Thus, it is rarely necessary to take any action to enforce a mediated agreement. If

⁶² ICC Mediation Rules 2014.

necessary, the lawyer assists the party in enforcing the terms of the agreement as any other written contract.

Nevertheless, until the mediated agreement is executed, the parties retain the right to challenge the agreement or oppose its enforcement.

Ultimately, a written agreement signed by the parties and the mediator, which includes a clause affirming its enforceability, holds the status of an executable document by the applicable enforcement legislation.

c. The signing ceremony

In principle, the ceremony of signing the mediated agreement is primarily a matter of formality rather than content. Nonetheless, this ceremony provides the parties with a symbolic moment that visually marks the conclusion of the dispute.

It serves as a ceremonial acknowledgment of the successful completion of the process and acts as a reminder to the parties of their achieved agreement.

J. Setting Aside or Revocation of the Settlement Agreement

In court-annexed mediation, revoking or setting aside a mediated agreement is rare but possible under certain circumstances. As it is in the nature of a judgment by consent, the Consent Settlement Order, which emanates from a mediated agreement, is usually 'not appealable, but it may be reviewed on such grounds as fraud or misrepresentation.'⁶³ This generally occurs if one party has been dishonest with the mediator or the other party, and crucial information that was previously unknown is uncovered during the discovery phase.

Other grounds for requesting the revocation of a mediated settlement agreement include instances of fraud, deceit, coercion, duress, misrepresentation, or if the terms of the agreement are deemed unfair or unreasonable to one party.

Another ground for setting aside a mediated agreement is misrepresentation or lack of authority to settle by a participant in court-annexed mediation.⁶⁴ For instance, in *Guru Engineering Works Ltd. v. CORECU*,⁶⁵ a Consent Settlement Order was successfully challenged and reviewed by the High Court for misrepresentation. Those who attended the mediation session in this case did not have authority to make final decisions for the applicant firm. So, the order was set aside and the court ordered for another mediation session. This judicial reasoning is akin to the position in labour dispute mediation in which it is the law that where one of the parties is a corporate body, the representative must have the mandate and capacity to make final decision in the mediation process.⁶⁶

While these are common principles, some legal systems may have additional grounds for challenging a mediated settlement agreement. It is essential to consider issues related to public order that could serve as a basis for requesting the revocation of the mediated agreement.

⁶³ Mashamba, J.C., *Alternative Dispute Resolution in Tanzania: Law and Practice* (Dar es Salaam: Mkuki na Nyota, 2014), p. 120..

⁶⁴ Order VIII Rule 28 of the CPC provides expressly that:

"28.-(1) A party to a mediation session shall have authority to settle any matter during the mediation session.

(2) A party who requires the approval of another person before agreeing to a settlement shall, before the mediation session, arrange to have ready means of communication to that other person throughout the session, whether it takes place during or after regular business hours."

⁶⁵ HCT, CC No. 320/1996.

⁶⁶ *Miombo Safaris Ltd. v. Jumanne Hamisi*, High Court of Tanzania (Labour Division) at Dar es Salaam, Labour Revision No. 8 of 2008 (Unreported)..

K. Reasons to Arbitrate

It has been demonstrated that mediation is an efficient and suitable method for dispute resolution. In contemporary practice, however, parties increasingly incorporate multi-tier clauses or hybrid processes into their agreements.

Hybrid processes, which utilize multiple types of dispute resolution procedures, are increasingly common in contemporary settings. The primary aim of these hybrid approaches is to resolve disputes peacefully and efficiently.

Initially, such hybrid procedures were employed in sectors related to security, particularly within unions where strikes were prohibited.

The significant advantage of these hybrid methods is their flexibility, allowing them to be tailored to the specific needs of the parties involved, in contrast to other dispute resolution methods.

In this context, several permutations are possible, including mediation followed by arbitration or arbitration followed by mediation. Although the latter is less common, in these cases, the arbitration decision is withheld from the parties until mediation has produced a negotiated resolution.⁶⁷

L. Settlement in the Shadow of the Arbitration

In an era where many disputes are referred to arbitration tribunals, it is increasingly practical for parties to intensify their efforts to reach a settlement after mediation has failed but before proceeding to arbitration.

This approach, sometimes referred to as leveraging the 'shadow of arbitration,' enables parties to use the prospect of arbitration as an incentive to expedite the settlement process.

Moreover, when parties recognize that their chances of success in arbitration are limited, their motivation to reach a settlement prior to arbitration typically increases.

M. Enforcement of the Mediated Settlement Agreements (MSA)

In the context of this module, it is crucial to outline the legal framework for enforcing MSAs within the United Republic of Tanzania, because it is fundamental to ensure the enforcement of the agreements reached in this procedure.

MSAs reached through court-annexed mediation are enforced under Section 33 and Order XXI of the Civil Procedure Code. The underlying principle for the implementation of agreements is that the parties have reached a consensus and are thus obligated to fulfil the agreement in good faith.

Should a party refuse to comply with the agreement, the other party is entitled to initiate procedures to enforce the MSA.

In contrast, the enforcement of out-of-court MSAs differs, as these mediation processes are not part of civil litigation. Therefore, this section of the module will explore the most effective methods for enforcing these agreements, considering both the national legal framework and best international practices.

⁶⁷ See more at: <https://immediation.org/resources/hybrid-dispute-resolution-processes...>

In preparing this module, various mediation systems have been analysed to determine which have successfully met their primary objective, which is to facilitate alternative dispute resolution for the parties involved. Additionally, these models were analysed to assess the effectiveness of these systems in achieving the secondary goal of mediation – reducing the number of cases adjudicated in the courts.

Based on the evaluation of results, it has been determined that the mediation system in the Republic of Kosovo has demonstrated significant progress since its establishment and could be used as a model for this module from a comparative perspective.

The system of mediation in Kosovo was established in 2008 with the first Law on Mediation Nr.03/L-057 (hereinafter referred to as Kosovo Law on Mediation), which has since been amended with Law No. 06/L-009 on Mediation. The present law governs the procedures, operations, and organization of mediation, as well as the rights, duties, and responsibilities of mediators. It is designed to facilitate access to alternative dispute resolution mechanisms and promote the amicable resolution of disputes⁶⁸. Importantly, the Kosovo Law on Mediation is aligned with Directive 2008/52/EC of the European Parliament and the Council, dated May 21, 2008, which addresses certain aspects of mediation in civil and commercial matters.

With the enactment of the initial mediation law and with the support of various donors, including OSCE, USAID, the Berlin Centre for Integrative Mediation (CSSP), and others, the Republic of Kosovo established its first mediation centres in key regions. These centres serve as mechanisms and structures for managing and referring mediation cases from courts and prosecutors' offices, as well as facilitating private and out-of-court mediation.⁶⁹

The Ministry of Justice licensed the first group of mediators in 2011, followed by the second group in 2014 and the third one in 2017. The training and certification of these mediators were made possible through the collaboration of the aforementioned donors and the Mediation Commission established for this purpose in the Ministry of Justice.⁷⁰

⁶⁸ Article 1 of the Law Nr. 06/L – 009 on Mediation

⁶⁹ See more at: www.ndermjetesimi.com.

⁷⁰ Ibid. ..

Enforcement of Mediated Settlement Agreements in Kosovo

In terms of implementing agreements resulting from mediation procedures, Kosovo's legislation designates these agreements as having the status of an enforceable document (*titulus executionis*) as defined by the Law 04/L – 139 on Execution Procedure (hereinafter referred to as Kosovo Law on Execution Procedure). Additionally, any agreement reached through mediation must comply with Law No. 04/L – 139 on Obligations (hereinafter referred to as Kosovo Law on Obligations), and be suitable for enforcement.⁷¹

i. Court Enforcement of Mediated Settlement Agreements

For a mediation agreement to be deemed successful, it must have a tangible legal effect.

Under the provisions of the Kosovo Mediation Law, when a case is referred by the court, the written agreement is submitted to the court. Upon approval, the agreement is considered an enforceable document by the Kosovo Law on Execution Procedure.⁷²

If the case is referred by the prosecution, the written agreement is sent to the prosecution. After approval by the chief prosecutor, it is regarded as a final decision.⁷³

In instances where the case is referred by a competent administrative body, the written agreement must be submitted to the relevant administrative authority. Following approval by the head of the administrative body, the agreement is deemed an enforceable document.⁷⁴

Finally, when mediation is initiated independently by the parties, the written agreement—signed by both parties and the mediator and including a clause confirming its enforceability—has the status of an enforceable document by the Kosovo Law on Execution Procedure.⁷⁵

ii. Enforcement of Mediated Settlement Agreements Through Private Enforcement Agents

As previously outlined, for a mediated agreement to be suitable for execution, it must possess the characteristics of enforceability. According to the Kosovo Law on Execution Procedure, an agreement reached through mediation, once approved by the court, is considered a credible document.⁷⁶

Furthermore, according to this legislation, a mediation agreement, upon court approval, is treated as a court decision and is deemed enforceable.

The execution procedure is initiated either through a creditor's proposal or by the court acting on its official duty.⁷⁷ The executive body or private enforcement agent then determines the enforcement through an order (decision) based on a credible document. As previously mentioned, an agreement concluded in a mediation procedure, in accordance with the Kosovo Law on Mediation, qualifies as such a credible document.

Upon receiving a proposal to initiate execution based on this credible document, the enforcement agent issues an order (decision) for execution.⁷⁸ This order authorizes the enforcement of the agreement reached through mediation.

⁷¹ Article 14 of the Law Nr. 06/L – 009 on Mediation. ..

⁷² Article 15 of the Law Nr. 06/L – 009 on Mediation.

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Article 25 of Law No. 04/L – 139 on Execution Procedure.

⁷⁷ Ibid, Article 4.

⁷⁸ Ibid, Article 43.

A party may challenge the enforcement decision through standard legal remedies, including objection and appeal to the competent court.⁷⁹ Additionally, the party may seek an extraordinary legal remedy by requesting a return to the previous state (*restitutio in integrum*).

The court, in all its instances, is the final authority on determining the legality of orders (decisions) issued by the private enforcement agent.

iii. Reduction of Case Backlog in Kosovo Courts

The adoption of alternative dispute resolution mechanisms, such as mediation and arbitration, as well as other methods aimed at reducing court caseloads, has led to a significant decrease in the number of unresolved cases in Kosovo.

According to a USAID report on its activities in Kosovo, since May 2016, over 6,200 cases—representing 16 percent of the backlog of cases older than two years—have been successfully resolved with the support of this donor.⁸⁰

Association of Mediators in Kosovo

In the legal system of Kosovo, the profession of mediator is classified as a free profession, resulting in limited direct oversight by state executive bodies. This is due to the Chamber of Mediators having autonomous governing bodies.

i. Established Under the Supervision of the Ministry of Justice

The Kosovo Mediation Law designates the Chamber of Mediators of Kosovo as an independent, non-profit legal entity.⁸¹ It operates under this law and its statute, which has been approved by the Chamber's General Assembly and endorsed by the Ministry of Justice.

ii. Self-regulating Association of Mediators

A review of the Chamber's operations reveals a highly structured organization designed to facilitate the effective functioning of mediators, including oversight, quality control, ethics, and discipline.⁸²

The activities of the Chamber are governed by its Statute and the Regulations for the Work of the Assembly of the Chamber, which have been approved by the Ministry of Justice.

iii. Rules and Procedures of the Association of Mediators

The Rules of Procedure for the Assembly of the Chamber of Mediators of Kosovo⁸³ establish the framework for its operations in accordance with applicable laws and regulations.

These rules address various procedural aspects, including the format of assembly meetings, the election of the chairperson, the agenda, and other practical matters concerning the Assembly's functioning.

Additionally, this regulation provides for the establishment of specialized work committees and outlines the processes for the election and removal of other Chamber bodies.

⁷⁹ Ibid, Article 68.

⁸⁰ See at: <https://www.usaid.gov/kosovo/news/kosovos-courts-reduce-case-backlog-and-delays..>

⁸¹ Article 21 of Law Nr. 06/L – 009 on Mediation..

⁸² See more at: <https://ndermjetesimi.com/en/aktet-e-odes/>

⁸³ See more at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=31812..>

iv. System of Monitoring of Association's Activities

Regarding the oversight of mediators' activities, it is important to note that the Ministry of Justice primarily conducts this monitoring through by-laws.⁸⁴

The Ministry of Justice oversees key aspects such as the training and certification of mediators, fee structures, the mediator registry, supervision, responsibilities, disciplinary procedures, and professional conduct.

As an observer of mediation developments in Kosovo, it is evident that there have been instances where the Ministry of Justice has reduced the Chamber of Mediators' competencies, particularly concerning fee regulation and disciplinary actions. Nevertheless, it is also worth noting that these mechanisms have successfully coexisted since their establishment in the Republic of Kosovo

N. Recognition and Enforcement of International Mediated Agreements Under the Singapore Convention

In the local context, the procedures and conditions for enforcing MSAs, both in court-annexed mediation and those mediated outside the courts, have been previously addressed.

From an international perspective, however, the enforcement of mediated settlement agreements should be considered through the lens of the Singapore Convention (which will be discussed further below). This Convention facilitates the enforcement of mediated settlement agreements against a party that has breached the terms of settlement, and it stipulates that a party may seek enforcement of a mediated settlement agreement by a competent authority if the following conditions are met⁸⁵:

1. The agreement is duly signed by the parties.
2. There is evidence that the agreement resulted from mediation, such as:
 - i. The mediator's signature on the agreement.
 - ii. The document indicating that mediation was conducted.
 - iii. A certificate from the institution that facilitated the mediation.
 - iv. Alternatively, any other evidence acceptable to the competent authority.

The definition of competent authority is determined by the legislation of the party responsible for enforcing the mediated settlement agreement. The Singapore Convention does not apply to settlement agreements reached through mediation that are enforceable as a judgment in the state in which enforcement is sought; have been recorded and are enforceable as an arbitral award; or have been approved by a court or concluded in the course of proceedings before a court (article 1(3)).

Tanzania is yet a party to the Convention. While the Tanzanian judiciary already strives to uphold settlement agreements entered into by mediation, any development to streamline the process for enforcement is to be welcomed.

⁸⁴ See more at: <https://ndermj.etesimi.com/en/aktet-e-odes/>.

⁸⁵ Article 4 of the United Nations Convention on International Settlement Agreements Resulting from Mediation (https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf)

VII. Ethical Issues and Codes of Conduct

The work of mediators is characterized by both autonomy and adherence to stringent ethical and professional standards set out in the *Code of Conduct and Practice for Reconciliators, Negotiators, Mediators and Arbitrators Regulations* (2021)⁸⁶ and Part IV of the the Judicature and Application of Laws (Appointment, Remuneration and Disciplinary of Mediators) Rules (2024),⁸⁷ which sets out the Code of Conduct and Disciplinary Measures for Court-Annexed Mediators.

Mediators are responsible for informing the parties of their rights and obligations, as well as clarifying the mediator's role. They must protect the interests of the parties, foster public trust, and establish a legal framework that aligns with the mediation principles and international best practices.

a. Self-determination

As previously discussed, adherence to the fundamental principles of mediation is crucial throughout the entire process of mediation. A key component is the voluntary participation of the parties, who must enter the mediation process and make informed decisions without coercion.

The principle of self-determination is vital, as studies indicate that the effectiveness of judicial processes resulting from mediation is often higher when parties retain greater autonomy in decision-making.⁸⁸

b. Mediator's impartiality

Throughout the mediation process, the mediator must remain entirely independent and impartial.

Maintaining impartiality not only enhances the likelihood of effective execution of the mediation agreement but also upholds the integrity of the mediation process.

As Shapira aptly noted, recognizing the critical importance of impartiality is fundamental to effective mediation practice.⁸⁹

c. Mediator's competence

Like all professions, mediators must possess both theoretical knowledge and practical skills to effectively practice their profession. In most countries, this expertise is achieved through structured training and accreditation processes, ensuring that mediators are well-versed in relevant legislation and practical aspects to facilitate a fair and lawful mediation process.

While different countries have varying criteria for the competence and credentials of mediators, a common requirement is that certified mediators must be listed with recognized bodies such as commissions, ministries, or courts. These organizations provide external validation and accreditation of the mediators' qualifications and skills.

⁸⁶ G.N. No. 148 of 2021.

⁸⁷ G.N. No. 820 of 2024.

⁸⁸ See more at: www.cl.cobar.org/features/the-benefits-of-promoting-party-self-determination-in-mediation

⁸⁹ Omer Shapira, *A Theory of Mediators' Ethics* (Cambridge University Press, 2016), p. 207.

d. Confidentiality and its exceptions

The mediation process is inherently confidential, with public access excluded. Statements and all information related to the mediation cannot be used as evidence in any other proceeding without the consent of the parties involved. The mediator, the parties, and their representatives are obligated to uphold the confidentiality of the mediation process unless the parties agree to waive this confidentiality. With the parties' consent, the mediation agreement may be disclosed per applicable legislation.

e. Conflicts of interest

Throughout the mediation process, the mediator must remain vigilant to ensure that any situation or circumstance that might compromise their impartiality is promptly disclosed. The mediator is required to declare any such circumstances and take appropriate actions to prevent potential conflicts of interest.

In cases where a conflict of interest arises, the mediator must terminate the mediation procedure and recommend that it continue with another mediator, unless the parties, having been fully informed of the conflict, expressly agree in writing to retain the same mediator.

Furthermore, the mediator must not engage with either party in the same dispute, either during or after the conclusion of the mediation process.

f. Enforcement of Ethics for Negotiators and Mediators

Violations of ethical rules for court-annexed negotiators and mediators are enforced through the procedure laid down in the *Code of Conduct and Practice for Reconciliators, Negotiators, Mediators and Arbitrators Regulations* (2021)⁹⁰ and Part IV of the the Judicature and Application of Laws (Appointment, Remuneration and Disciplinary of Mediators) Rules (2024),⁹¹ which sets out the Code of Conduct and Disciplinary Measures for Court-Annexed Mediators. Mediators who conduct court-annexed mediation⁹² are registered under the Judicature and Application of Laws (Appointment, Remuneration and Disciplinary of Mediators) Rules (2024).⁹³ It should be noted that the Code of Conduct for ADR Practitioners applies *mutatis mutandis* to mediators conducting court-annexed mediation.⁹⁴ Therefore, a mediator who breaches the Code commits a professional misconduct⁹⁵ and is liable to disciplinary actions that are imposed pursuant to Code and the Judicature and Application of Laws (Appointment, Remuneration and Disciplinary of Mediators) Rules (2024). Their disciplinary authority is the Judge in-charge of the High Court Registry, Sub-Registry or Divisions in the region in which the concerned mediator works.⁹⁶ Notably, a mediator serving judicial officer, who commits a professional misconduct, is liable to such disciplinary action as prescribed for under the Judiciary Administration Act (2011).⁹⁷

Any person, who is aggrieved by the conduct of a mediator and believes that the mediator has committed a professional misconduct, may lodge a complaint to the Judge in charge against such misconduct.⁹⁸ The complaint should be in writing either in English or Kiswahili supported by any other document or information as proof of the alleged complaint.⁹⁹ In addition, the Judge in-charge may commence disciplinary proceedings against a misconducting mediator *suo mottu*.¹⁰⁰

⁹⁰ G.N. No. 148 of 2021.

⁹¹ G.N. No. 820 of 2024.

⁹² Mediators conducting court-annexed mediation are registered under the Judicature and Application of Laws (Appointment, Remuneration and Disciplinary of Mediators) Rules (G.N. No. 820 of 2024).

⁹³ Ibid, Rule 13(b).

⁹⁴ Ibid, Rule 12(1).

⁹⁵ Ibid, Rule 12(3).

⁹⁶ Ibid, Rule 12(2).

⁹⁷ Ibid, Rule 13(a).

⁹⁸ Ibid, Rule 14(1).

⁹⁹ Ibid, Rule 14(2).

¹⁰⁰ Ibid, Rule 14(3).

Within seven days of receipt of a complaint, the Judge in-charge is obliged to determine whether the complaint is tenable or frivolous and vexatious.¹⁰¹ Where the Judge in-charge is satisfied that a complaint is tenable, subject to the rights of the mediator to be heard, he/she may impose any of the following sanctions against the mediator:

- (i) Issue a written warning;¹⁰²
- (ii) Require him to pay such amount of money as may be adequate to cover the cost or loss incurred by the complainant as a result of the complaint;¹⁰³
- (iii) Recommend to the Chief Justice for mediator's suspension or revocation;¹⁰⁴ or
- (iv) Make any other action as the Judge in-charge may consider fit.¹⁰⁵

IX. Activity – Negotiation Role Play

Following the introduction and the discussion on the institutional structure of Alternative Dispute Resolution (ADR) in Tanzania, particularly after detailing the key issues of the relevant legislation, participants are now encouraged to engage more actively in the training.

They will work in groups using the narrative negotiation platform and scenarios from below, which are designed to encapsulate the main elements of negotiation, including contract formation, dispute resolution, strategies, and negotiation tactics.

¹⁰¹ Ibid, Rule 15(1).

¹⁰² Ibid, Rule 15(2)(a).

¹⁰³ Ibid, Rule 15(2)(b).

¹⁰⁴ Ibid, Rule 15(2)(c).

¹⁰⁵ Ibid, Rule 15(2)(d).

Scenario 1: Contract and Initial Agreement

Participants:

- Frank Mwinyi, Sales Director, Tembo (Dar es Salaam-based company)
- Amani Kijaji, Managing Director, Nyota (Nairobi-based company)

Venue: Dar es Salaam, February 2017

Brief Facts: Tembo has been a leading manufacturer of observation instruments for over 20 years, relying on modular systems sourced from Jua Technologies Ltd. in Kenya. Amani Kijaji, representing Nyota, expresses interest in ordering 100 units (23,000 USD each) of Tembo's latest Special Observation Instrument. The delivery date of the units was set to be 20 November 2017, while an advance payment of 40 % was made by Nyota.

Main Points:

- Price: USD 23,000 each
- Delivery Date: November 20, 2017
- Payment Terms: 40% advance, 60% bank guarantee
- Arbitration Clause: Disputes to be resolved by the Tanzania Institute of Arbitration

Role Play:

Frank Mwinyi: *Welcomes Amani Kijaji into the office.* "Mr. Kijaji, thank you for considering Tembo for your precision laser technology needs. Our Special Observation Instrument is priced at USD 23,000 per unit. We can deliver by November 20, 2017, with a 40% advance and a 60% bank guarantee."

Amani Kijaji: *Nods, reviewing the offer.* "Mr. Mwinyi, Nyota is pleased with the offer, especially given the quality and modular design of your instruments. However, we must ensure timely delivery due to our commitments in Nairobi. We will proceed with the advance payment of USD 92,000."

Frank Mwinyi: *Confidently.* "Excellent. Our partnership with Jua ensures competitive pricing and high-quality modules. Here is our order confirmation, including the arbitration clause for any disputes."

Amani Kijaji: *Signs the order confirmation.* "Agreed. Let's move forward. I will confirm the purchase order details via email."

Results:

- Nyota confirmed the purchase order on March 6, 2017, with their own arbitration clause.
- Advance payment of USD 92,000 made on April 1, 2017

Questions:

1. How was the contract negotiated and concluded between Tembo and Nyota?
2. Tembo's email message is entitled "Order Confirmation." What is the function of an order confirmation?
3. How did the parties manage to keep the messages so short even though they reached an agreement worth over 2 million dollars?
4. Lawyers were probably not involved in the conclusion of the contract. Does this present any problems from a lawyer's perspective?

Scenario 2: Supply Chain Disruption and Initial Dispute

Participants:

- Frank Mwinyi, Sales Director, Tembo
- Amani Kijaji, Managing Director, Nyota

Venue: Tembo's headquarters, November 20, 2017

Brief Facts: Tembo's supplier, Jua Technologies Ltd., cannot deliver due to the economic crisis in East Africa, impacting Tembo's ability to meet the agreed delivery date. Tembo requests a delay, and Nyota agrees but reserves legal rights.

Main Points:

- Jua's bankruptcy in August 2017 affected delivery.
- Tembo negotiates with a new supplier in Tanzania.
- Tembo requests delivery postponement to January 20, 2018.
- Nyota agrees but reserves rights.

Role Play:

Frank Mwinyi: *Emails Amani Kijaji.* "Mr. Kijaji, due to significant problems with our supplier Jua Technologies Ltd. cannot deliver on time. We are negotiating with a new supplier and request a postponement of the delivery until January 20, 2018."

Amani Kijaji: *Replies cautiously.* "Mr. Mwinyi, given our history of cooperation, we agree to the delay but reserve all legal rights concerning this postponement."

Results:

- Tembo continues negotiations with the new supplier.
- Nyota prepares for potential legal action if delays persist.

Questions:

1. See what has happened in the business relationship between Tembo and Nyota so far. Can you describe what type of "business dispute" it represents?
2. How do conflicts escalate into disputes?
3. Why did the business dispute arise between Tembo and Nyota? What problems are involved? Can you tell the difference between legal and non-legal problems?
4. What options does Nyota have for resolving the dispute with Tembo? Think about the differences between these options!
5. Which option should Nyota choose in this case? Look and think about the commercial implications of such an option too!

Scenario 3: Preparing for Negotiations

Participants:

- Frank Mwinyi, Sales Director, Tembo
- Amani Kijaji, Managing Director, Nyota

Venue: Dar es Salaam, February 28, 2018

Brief Facts: Mr. Kijaji and Mr. Mwinyi prepare for a crucial meeting to resolve the dispute over delayed delivery and increased costs. Both parties have different negotiation strategies and objectives.

Main Points:

- Tembo seeks a compromise on increased costs.
- Nyota is initially rigid on sticking to the original contract price.
- Both sides aim to avoid damaging their business relationship.

Role Play:

Frank Mwinyi: *Prepares notes and documents for the meeting. "Our CEO, and I agree that maintaining a positive relationship with Nyota is crucial. I will propose Nyota bears 50% of the additional costs, but we can settle for 25% if necessary."*

Amani Kijaji: *Meets with colleagues to strategize. "We have a strong contractual position, but we should be open to a reasonable compromise to avoid arbitration. I'll start with a firm stance but consider a slight concession if needed."*

Results:

- Both parties prepare for the meeting with clear objectives and fallback positions.
- An agenda is sent by Mr. Kijaji to ensure a structured discussion.

Questions:

1. Mr. Kijaji has justified his proposal to negotiate with Mr. Mwinyi on February 28, 2018, at 10:00 am in Dar es Salaam due to a busy schedule. Could there be other reasons here?
2. How do you judge the remark of Mr. Mwinyi that he must return on the evening of February 28, 2018, to prepare for the meeting of the Shareholders' Assembly scheduled for early March?
3. What do you think about the step of Mr. Kijaji's sending an agenda for negotiations with Mr. Mwinyi right after the call?
4. Imagine that you are Mr. Mwinyi or Mr. Kijaji. How would you prepare for negotiations in Dar es Salaam? What would be the essential considerations that you would take into account?
5. Try once again to put yourself in the shoes of Mr. Kijaji and Mr. Mwinyi. How do you see the negotiating position vis-à-vis the other party?
6. Why didn't Mr. Kijaji and Mr. Mwinyi resolve the dispute through a teleconference or through email?

Scenario 4: Breakdown in Negotiations

Participants:

- Frank Mwinyi, Sales Director, Tembo
- Amani Kijaji, Managing Director, Nyota

Venue: Dar es Salaam, February 28, 2018

Brief Facts: Mr. Mwinyi arrives at Mr. Kijaji's office, but the meeting starts poorly. Mr. Kijaji insists on adhering to the original contract, threatening arbitration. Negotiations initially fail to progress, but a personal appeal by Mr. Mwinyi leads to a brief reconsideration.

Main Points:

- Mr. Kijaji's rigid stance on price.
- Mr. Mwinyi's appeal.
- Threat of arbitration.

Role Play:

Frank Mwinyi: *Enters the meeting room after waiting for an hour.* "Mr. Kijaji, I understand the challenges, but the situation with our supplier was unforeseen. We propose Nyota bear 50% of the additional costs to resolve this amicably."

Amani Kijaji: *Firmly.* "Our board has instructed me to adhere to the original contract terms. Delays incur a 0.3% daily penalty. If we cannot agree, we will proceed to arbitration."

Frank Mwinyi: *Appeals personally.* "Amani, we've worked together for years. Please consider the broader impact. Let's find a middle ground."

Results:

- Mr. Kijaji agrees to consult the board, suggesting they reconvene later.

Questions:

1. See how Mr. Kijaji and Mr. Mwinyi discuss the dispute between their companies. Can you define "negotiation" by highlighting the essential elements of negotiation?
2. How would you characterize the negotiation style of Mr. Kijaji and Mr. Mwinyi? Can you think of any other method?
3. Imagine if Mr. Kijaji and Mr. Mwinyi were lawyers/jurists. Do you think that during their legal education and practical training, they would be good and efficient negotiators?
4. What options does Mr. Kijaji have to save the negotiations from failure from the start?
5. Imagine if Mr. Kijaji and/or Mr. Mwinyi were to be accompanied by their lawyers. What role do lawyers play in such negotiations?

Scenario 5: Final Negotiation Breakdown

Participants:

- Frank Mwinyi, Sales Director, Tembo
- Amani Kijaji, Managing Director, Nyota
- Juma Mchome, CFO, Nyota

Venue: Dar es Salaam, January 28, 2018

Brief Facts: Negotiations deteriorate further when Mr. Kijaji's rigid stance is supported aggressively by Mr. Mchome. Despite attempts at compromise, the meeting ends without an agreement, and both parties prepare for arbitration.

Main Points:

- Mr. Kijaji's rigid stance.
- Mr. Mchome's aggressive intervention.
- Failure to reach an agreement.

Role Play:

Frank Mwinyi: *Proposes a compromise.* "Nyota could bear 65% of the additional costs. This would help us move forward."

Juma Mchome: *Aggressively.* "Tembo must adhere to the original contract terms. No concessions."

Amani Kijaji: *Calms the situation.* "Let's resume. Frank, what's your final offer?"

Frank Mwinyi: *Sighs.* "Alright, 50-50 split. It's the best we can do."

Amani Kijaji: *Firmly.* "15% is the most we can offer. Otherwise, we proceed to arbitration."

Outcome:

- Negotiations end without agreement.
- Both parties prepare for arbitration

Questions:

1. How would you characterize the negotiations between Mr. Kijaji and Mr. Mwinyi in the afternoon session? What tactics did they use?
2. How do you judge the role of Mr. Mchome during negotiations?

Activity – Mediation Case Study

Following the introduction and the discussion on the institutional structure of Alternative Dispute Resolution (ADR) in Tanzania, particularly after detailing the key issues of the relevant legislation, participants are now encouraged to engage more actively in the training.

They will work in groups using the narrative mediation platform and scenario from below, which is designed to encapsulate the main elements of mediation, including opening statements by parties, mediation phases, drafting the settlement agreement, and mediation closure

The mediation process, as per the below scenario, will be divided among several groups, with each group responsible for a distinct stage. The first group will prepare the mediation proposal and develop the agenda. The second group will draft the mediator's opening statement, while the third group will focus on preparing the opening statements for the parties involved. The fourth group will be tasked with elaborating on the proposals, and the final group will draft the mediated agreement

Case Scenario – Mediation:

Participants:

- Zawadi Makange
- Mwajuma Kazi
- Mediator

Venue: Dar Es Salaam

Brief facts: The Makange brothers, four siblings from Dar es Salaam, inherited TZS 1,200,000,000 from their parents 40 years ago. Their parents' friend, Peter Mushi, invested the inheritance into purchasing "The Kilimanjaro Hotel," a prominent sea-front hotel in Arusha. Over the decades, the hotel declined in condition and rating, losing its 5-star status 20 years ago and its 4-star rating 3 years ago.

Faced with a need for significant renovation, the brothers sought external funding to revitalize the hotel. Mwajuma Kazi, a bank relationship manager with a personal connection to the hotel, championed their cause and secured a loan of TZS 2,200,000,000 from Umoja Kwanza Bank.

The renovation was completed successfully, and the hotel regained its 4-star rating.

Despite this, the hotel's financial performance has been underwhelming, and the brothers have begun missing loan repayments.

If the Makange brothers keep missing loan payments, the Umoja Kwanza Bank will have to initiate proceedings to take the hotel from them. Before anything serious has a chance to happen, Mwajuma, with full authority to represent the bank, and Zawadi Makange, representing all four brothers, have decided to sit down and have mediated discussions and negotiations.

Mediation Process

- Proposal to mediate
- Agenda
- Gathering information

Mediator Opening Statement:

Parties' Opening Statement:

Proposed Solutions:

- Extended Repayment Plan
- Performance-Based Conditions
- Additional Support
- Contingency Plan

Resolution and Agreement:

Reasons to Arbitrate:

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Constitutions, laws, and bylaws

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- Law Nr. 06/L – 009 on Mediation
- 04/L – 139 on Execution Procedure

Treaties and conventions

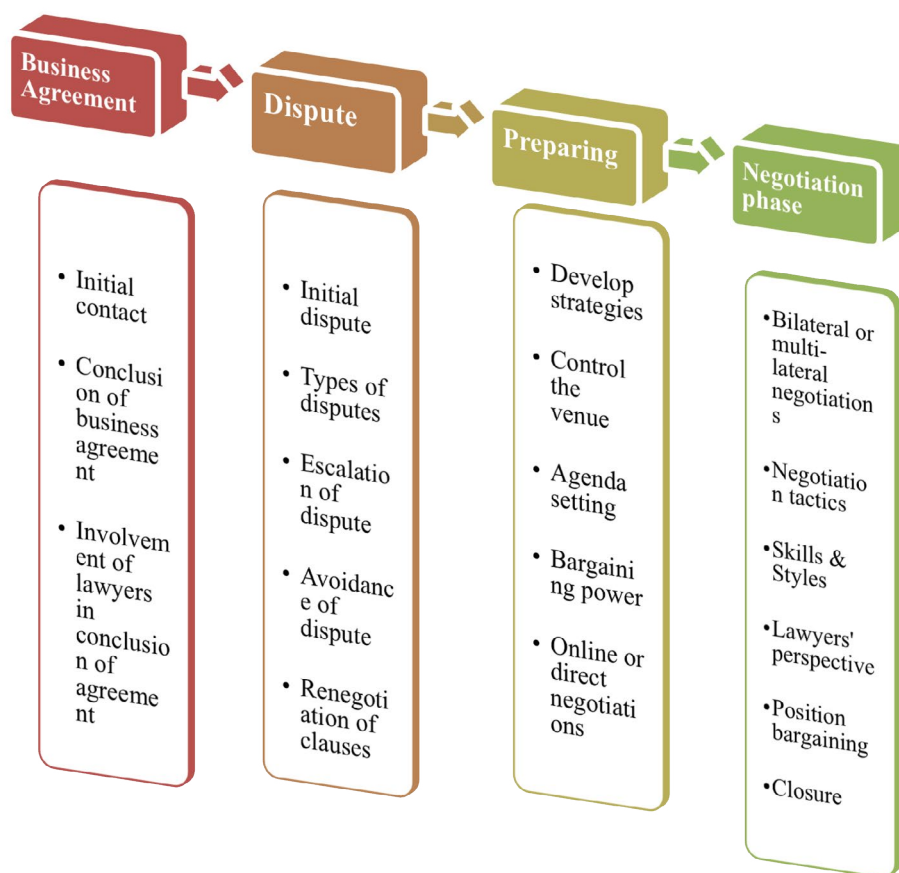
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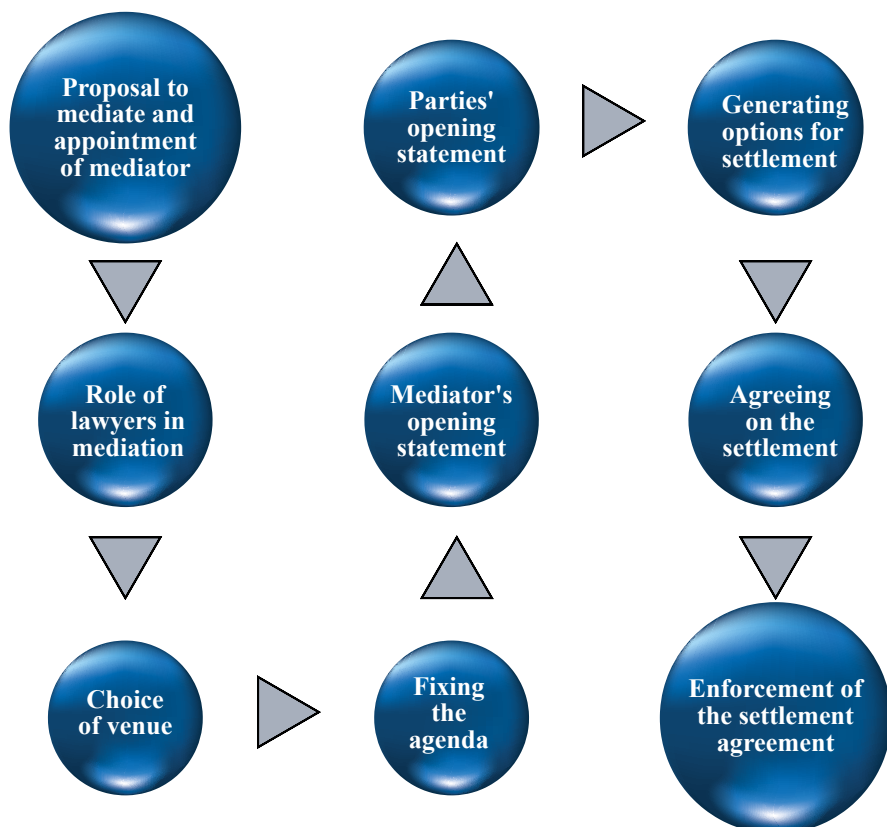
ANNEX 1:

Sequence of Actions in Negotiations



ANNEX 2:

Sequence of Actions in Mediation



Training Agenda

Time	Day 1 of the Training on Negotiation & Mediation Date: __/__/__
8:30 – 9:00	Registration and Welcome
9:00 – 9:30	Welcome Note - Overview of the Training Agenda - Objectives and Methodology - Expected Outcomes Representative of the Government Representative of the GIZ
9:30 – 11:00	Introduction to Alternative Dispute Resolution - ADR Institutions in Tanzania - ADR vs Litigation - Ad-hoc ADR vs Institutional ADR
11:00 – 11:15	Coffee Break
11:15 – 12:00	ADR Legal & Regulatory Framework - Constitution of the United Republic of Tanzania - Arbitration Act - Civil Procedure Code - Employment and Labour Relations Act - Other relevant legislation
12:00 – 13:00	Lunch Break
13:00 – 14:45	Introduction to Negotiation - Principles of Negotiations - Characteristics, advantages & disadvantages of Negotiations - Negotiation Approaches & Styles
14:45 – 15:00	Coffee Break
15:00 – 16:45	Negotiation Process & Stages - Initial contact, negotiations, and conclusion of business agreement - Involvement of lawyers in the conclusion of business agreement - Dispute (types of disputes, avoidance of dispute, and renegotiation) - Developing strategies (control the venue, agenda & bargaining) - Negotiation phase (tactics, skills, lawyers' perspective & closure)
16:45 – 17:00	Discussions Q&A
	End of Day 1 of the Training

Time	Day 2 of the Training on Negotiation & Mediation Date: __/__/__
9:00 – 9:30	Recap from 1 st day of Training
9:30 – 10:00	Negotiation Role-Play - Division of Work Groups - Distribution of Tasks
10:00 – 11:45	Working in the Working Groups - Instructions from Trainers - Discussion on issues presented to trainees
11:45 – 12:00	Coffee Break
12:00 – 12:30	Presentation of Groups - Group 1, 5-7 minutes (Contract and initial agreement) - Group 2, 5-7 minutes (Supply disruption & initial dispute) - Group 3, 5-7 minutes (Preparing for negotiations) - Group 4, 5-7 minutes (Breakdown in negotiations) - Group 5, 5-7 minutes (Final negotiation breakdown)
12:30 – 13:30	Lunch Break
13:00 – 14:45	Introduction to Mediation - Principles of Mediation - Legal basis for the Mediation - Advantages & disadvantages of Mediation
14:45 – 15:00	Coffee Break
15:00 – 16:45	Mediation Process & Stages - Proposal to mediate and appointment of mediator - Role of lawyers in the mediation - Choice of venue - Fixing the agenda and gathering of information - Mediator's opening statement - Parties' opening statement - Generating options for settlement - Agreeing on the settlement - Enforcement of mediated settlement agreement
16:45 – 17:00	Discussions Q&A
	End of Day 2 of the Training

Time	Day 3 of the Training on Negotiation & Mediation Date: __/__/__
9:00 – 9:30	Recap from 2 nd day of Training
9:30 – 10:00	Mediation Role-Play - Division of Work Groups - Distribution of Tasks
10:00 – 11:45	Working in the Working Groups - Instructions from Trainers - Discussion on issues presented to trainees
11:45 – 12:00	Coffee Break
12:00 – 12:30	Presentation of Groups - Group 1, 5-7 minutes (Proposal to mediate, appointment of mediator) - Group 2, 5-7 minutes (Mediator's opening statement) - Group 3, 5-7 minutes (Parties' opening statement) - Group 4, 5-7 minutes (Generating options & identifying issues in med.) - Group 5, 5-7 minutes (Agreeing on settlement & drafting the agreem.)
12:30 – 13:30	Lunch Break
13:30 – 14:30	Comparative Aspects of Mediation - Enforcement of Mediated Settlement Agreements - Court Enforcement of Settlement Agreements - Enforcement of Agreements through Private Enforcement Agents - Association of Mediators
14:30 – 14:45	Coffee Break
14:45 – 16:00	- Ethical Issues in Mediation - Codes of Conduct - Cultural issues in Mediation - Singapore Convention on Recognition and Enforcement of International Mediated Agreements
16:00 – 17:00	Discussions Q&A
	End of Day 3 of the Training

Evaluation Form

I am a: ☐ Trainee

☐ Observer

☐ Trainer

Please indicate your impressions of the items listed below.

	Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree
1. The training met my expectations.	☐	☐	☐	☐	☐
2. I will be able to apply the knowledge learned.	☐	☐	☐	☐	☐
3. The training objectives for each topic were identified and followed.	☐	☐	☐	☐	☐
4. The content was organized and easy to follow.	☐	☐	☐	☐	☐
5. The materials distributed were pertinent and useful.	☐	☐	☐	☐	☐
6. The trainer was knowledgeable.	☐	☐	☐	☐	☐
7. The quality of instruction was good.	☐	☐	☐	☐	☐
8. The trainer met the training objectives.	☐	☐	☐	☐	☐
9. Class participation and interaction were encouraged.	☐	☐	☐	☐	☐
10. Adequate time was provided for questions and discussion.	☐	☐	☐	☐	☐

11. How do you rate the training overall?

Excellent

☐

Good

☐

Average

☐

Poor

☐

Very poor

☐

10. What aspects of the training could be improved?

11. Other comments?

THANK YOU FOR YOUR PARTICIPATION!

APPRECIATION

Sincere gratitude to each of you for your invaluable contributions to the validation of **ADR Training Manual: Introduction to Negotiation and Mediation**. Your dedication, keen attention to detail, and commitment to excellence have been instrumental in ensuring the accuracy and effectiveness of this document. This achievement would not have been possible without your collective efforts, insights, and collaboration.

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